APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1970

No. 609

JOHN O. GRAHAM, Commissioner,
Department of Public Welfare, State of Arizona,
Appellant,

—v.—

CARMEN RICHARDSON, et al,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

JURISDICTIONAL STATEMENT FILED AUGUST 28, 1970
PROBABLE JURISDICTION NOTED DECEMBER 14, 1970

LIST OF CONTENTS

RELEVANT DOCKET ENTRIES

Date 1969	PROCEEDINGS
Jul. 30	1. File Complaint.
Jul. 31	2. File copy of Notification and Certificate of the formation of three judges.
Aug. 18	3. File copy of Order Designating Honorable Gilbert H. Jertberg, Honorable James A. Walsh and Honorable C. A. Muecke.
Sep. 4	4. File Affidavit of Waiver of Process and Acceptance of Service.
Sep. 12	5. File Answer of Defendant.
Sep. 23	6. File plaintiffs' Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment.
Oct. 6	7. File Defendant's Motion for Summary Judgment and Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment.
1970	
Jan. 26	8. File Motion of Center on Social Welfare Policy and Law for Leave to File Brief Amicus Curiae and Statement of Interest of the Amicus.
Feb. 2	— MINUTE ENTRY: It is ordered that the respective motions of the parties for summary judgment are set for hearing on February 27, 1970, at 10:00 a.m., at Tucson.
Feb. 2	— Mail copies of minute entry to Judges Jertberg and Muecke and copies to Anthony B. Ching and Sandra D. O'Connor.
Feb. 20	— MINUTE ENTRY: It is ordered that the respective motions for summary judgment, set for February 27, 1970, at ten a.m., shall be heard at 8:30 a.m.

Date 1970	PROCEEDINGS
Feb. 20	— All judges being advised, resp. counsel advised of change of time of hearing on 2/27/70 by Judge Walsh's office.
Feb. 25	9. File Supplemental Memorandum in Support of Defendant's Motion for Summary Judgment.
Feb. 27	— MINUTE ENTRY: Motions of Respective Parties for Summary Judgment on for hearing before Judges Jertberg, Walsh and Muecke. Anthony B. Ching, Esq. and Jonathan Weiss, Esq., appear on behalf of pltf. Andrew W. Bettwy, Esq. and Michael Flam, Esq., appear on behalf of deft. Hearing is had. Order grant motion of Center on Social Welfare Policy and Law for leave to file brief as Amicus Curiae. Order grant pltf. leave to file amended complaint with amendments limited to advice given to Court. Order counsel to furnish Court with Memorandum as to legislative history on 42 USC 1352, in 15 days. Matter submitted upon receipt of Memo of pltf.
Mar. 12	10. File Plaintiffs' Response to Defendant's Supplemental Memorandum of Law.
Mar. 12	11. File First Amended Complaint.
Mar. 19	12. File defendant's Answer to First Amended Complaint.
May 27	13. Enter and file Opinion and Order granting plaintiffs' motion for summary judgment praying for a preliminary injunction and declaratory relief.
May 27	— Mail conformed copies of Opinion and Order to Anthony B. Ching and Michael Flam, Ass't. Atty. Gen.
June 11	14. File Defendant's Objections to Form of Judgment.

Date 1970	PROCEEDINGS
June 15	— MINUTE ENTRY: It is ordered by the Court that defendant's objections to the form of judgment proposed by plaintiffs are overruled.
June 15	15. Enter and file Judgment in favor of the plaintiffs and against the defendant, declaring fifteen-year durational residency requirement in the United States as unconstitutional and permanently enjoining defendant and his successors, agents and employees from enforcing the fifteen-year durational residency requirement as to the plaintiffs.
June 15	— Copies of Judgment mailed to Judge Jertberg and Judge Muecke by Judge Walsh.
June 17	— Copies of Judgment mailed to: Michael S. Flam, Spec. Asst. Atty. General, and Andrew Bettwy, Asst. Attorney General and to Anthony B. Ching, Esq.
June 26	16. File Stipulation that judgment entered June 15, 1970, be vacated and that Proposed Amended Judgment be signed and entered.
June 26	17. Enter and file Amended Judgment.
June 26	— Copies of Stipulation and Amended Judgment mailed by Judge Walsh to Judge Jertberg, Judge Muecke, Anthony B. Ching, Esq., and Attorney General of State of Arizona.
July 6	18. File defendant's Motion to Stay Enforcement and Execution of Judgment and Memorandum of Points and Authorities.
July 9	19. File defendant's Notice of Appeal to the Supreme Court of the United States.
July 9	20. File plaintiffs' Opposition to Motion to Stay Enforcement and Execution of Judgment.

Date 1970	PROCEEDINGS
July 9	21. File Memorandum of Points and Authorities in Support of Opposition to Motion to Stay.
July 20	22. File defendant's Reply to Opposition to Motion to Stay Enforcement and Execution of Judgment.
July 20	23. Enter and file Order Staying Enforcement and Execution of Judgment as to all parties plaintiff other than Carmen Richardson.
July 20	— Copies mailed to Judges Jertberg and Muecke by Judge Walsh's office.
July 20	— Mail copies of Order Staying Enforcement and Execution of Judgment to Anthony B. Ching, Esq. and Michael S. Flam, Special Ass't. Attorney General.
July 30	24. Enter and file Amended Order Staying Enforcement and Execution of Judgment.
July 30	— Mail copies of Amended Order Staying Enforcement and Execution of Judgment to Anthony B. Ching, Esq., and Michael S. Flam, Special Ass't. Atty. Gen.
Aug. 31	25. File Reporter's Transcript of Proceedings of February 27, 1970.
Oct. 1	— Transmit Record on Appeal to the Supreme Court of the United States.
Oct. 1	— Mail copies of Clerk's Certificate and Index to Record on Appeal to Anthony B. Ching, Esq. and Michael B. Flam, Special Assistant Attorney General.
Oct. 12	26. File Receipt of record on appeal. (Supreme Court Case No. 609).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, for herself and for all others similarly situated, Plaintiffs, vs. JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona, Defendant.	NO. CIV-69-158-TUC. — FIRST AMENDED COMPLAINT

COME NOW plaintiffs and allege as follows:

I

That this action is brought by plaintiffs under Title 42, subchapter (i), United States Code, and particularly § 1983 of said Title, and under Title 28, United States Code, §§ 1343, 2201, 2202, 2281 and 2284, seeking injunctive relief and a declaration that Title 46, Article 3, § 46-233(A)(1) of the Arizona Revised Statutes, as amended, is in violation of the Constitution of the United States, particularly the due process clause and the equal protection clause of the Fourteenth Amendment to the United States Constitution and the commerce clause of Article I, § 8, cl. 3, as well as being in conflict with and contrary to the federal Social Security Act providing for Aid to the Permanently and Totally Disabled Persons. That the state statute is also contrary to and is in conflict with 42 U.S.C. § 1981, as well as 42 U.S.C. § 2000(d) and § 2000(e) of the 1964 Civil Rights Act.

II

That plaintiff CARMEN RICHARDSON is a resident alien, having the status of a permanent resident residing in the State of Arizona. That she is and has been continuously a resident of the State of Arizona for a period of thirteen years. That prior to

making her residence in the State of Arizona, she resided in Mexico. She is presently 64 years and 9 months of age.

III

That defendant is the Commissioner of the Department of Public Welfare, State of Arizona, and is charged by law with the duty of administering the laws pertaining to Public Welfare, including the Aid to the Permanently and Totally Disabled Persons program, pursuant to the applicable federal Social Security Act and state law in the State of Arizona.

IV

That the plaintiff CARMEN RICHARDSON is a permanently and totally disabled person, and that she is entitled to receive benefits under the Aid to the Permanently and Totally Disabled Persons (APTD) program, administered by the defendant, but for the fact that Arizona Revised Statutes § 46-233(A)(1) requires that she must, as a condition of eligibility, have resided in the United States a total of 15 years.

V

That this action is brought on behalf of the plaintiff, as well as on behalf of each and all other persons similarly situated, who are alien residents lawfully admitted as permanent residents in the United States and who reside in the State of Arizona, and who are otherwise eligible to receive welfare benefits under the welfare laws of the State of Arizona, as well as the federal Social Security Act, to-wit: General Assistance (APTD), under Arizona Revised Statutes, Title 46, Chapter 2, Article 2; Old Age Assistance (OAA), Title 46, Chapter 3, Article 3; Assistance to the Blind (AB), Title 46, Chapter 2, Article 4, but who are denied said assistance and benefits by the defendant under the residency requirement statutes, to-wit: Arizona Revised Statutes, § 46-233(A)(1), § 46-252(2) and § 46-272(4), as amended, respectively. This class action is brought for the reason that such other persons in the class are so numerous as to make it impracticable to bring them all before the Court, and the right of the plaintiff,

which is the subject matter of this action, is typical to all of these persons, and the plaintiff will adequately and fairly represent and protect the interests of all such persons, and that questions of law or fact are common to plaintiff and all such persons; that further, the party opposed to the class, the defendant herein, has acted on grounds generally applicable to plaintiff and to all such persons as a class.

VI

That as a result of the action of the defendant, the plaintiff and all others similarly situated as the plaintiff, have suffered and will suffer irreparable injury, loss and damages, and that said irreparable injury, loss and damages will be suffered by plaintiff and those persons similarly situated as the plaintiff unless temporary and permanent injunctive relief is granted by this Court.

VII

That over the past several years, plaintiff CARMEN RICHARDSON has made repeated efforts to apply for APTD benefits at the Department of Public Welfare in Pima County in the City of Tucson; that her applications were repeatedly denied, solely on the basis of the requirement that she must have resided in the United States for a period of 15 years.

VIII

That the operation of Arizona Revised Statutes, § 46-233 (A)(1), as amended, as to the plaintiffs, is in violation of the due process of law and the equal protection of law guaranteed to them under the Fourteenth Amendment to the United States Constitution, as well as being in conflict with and contrary to the federal Social Security Act, providing for categorical welfare assistance.

WHEREFORE, plaintiffs pray as follows:

1. That a three-judge District Court be convened pursuant to 28 United States Code, § 2281 and § 2284.

2. That a date and time be set by this Court for hearing on plaintiffs' request for preliminary injunction.

3. That upon a hearing on plaintiffs' request for preliminary injunction, a preliminary injunction shall issue out of this Court, restraining and enjoining defendant from denying assistance to the plaintiffs.

4. That Titles 46-233(A)(1), 46-252(2) and 46-272(4), as amended, of the Arizona Revised Statutes, requiring a durational residency requirement in the United States as to plaintiffs, be declared unconstitutional as violative of the due process clause and the equal protection clause of the Fourteenth Amendment to the United States Constitution, as well as being contrary to and in conflict with the federal Social Security Act providing for categorical welfare assistance, and that the defendant be permanently enjoined from enforcing said unconstitutional and illegal statutory provisions.

5. That monies plaintiffs are entitled to receive under the welfare laws of the State of Arizona and the federal Social Security Act, which are unconstitutionally withheld from them, be awarded to them.

LEGAL AID SOCIETY OF THE PIMA COUNTY BAR ASSOCIATION

By: ANTHONY B. CHING
Anthony B. Ching
Chief Trial Counsel
112 West Pennington Street
Tucson, Arizona 85701
Attorneys for Plaintiffs

STATE OF ARIZONA }
COUNTY OF PIMA } ss

ANTHONY B. CHING, being first duly sworn, upon his oath deposes and says: That he is the attorney for the plaintiffs in the above-entitled matter; that he has read the foregoing First Amended Complaint and knows the contents thereof, and that the same is true of his own knowledge, except those matters therein stated on information and belief, and as to those matters, he believes it to be true.

ANTHONY B. CHING
Anthony B. Ching

SUBSCRIBED AND SWORN TO before me this 11th day of March, 1970, by ANTHONY B. CHING.

JUDITH BASMAJIAN
Notary Public

My commission expires:
August 1, 1972

Copy of the foregoing mailed this
12th day of March, 1970, to:

Andrew Bettwy, Esq.
Assistant Attorney General
159 Capitol Building
Phoenix, Arizona 85007
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, for herself and for all others similarly situated, Plaintiffs, v. JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona, Defendant.	NO. CIV-69-158-TUC. — ANSWER TO FIRST AMENDED COMPLAINT

Defendant, JOHN O. GRAHAM, answers this complaint herein as follows:

I

Defendant admits the allegation in paragraph I of the Complaint that the action is brought by Plaintiffs under 42 U.S.C. § 1983, and 28 U.S.C. §§ 1343, 2201, 2202, 2281 and 2284, seeking injunctive and declaratory relief, but denies that ARS § 46-233 (A)(1) is in violation of the Constitution of the United States, or in conflict with and contrary to, the Federal Social Security Act; or in conflict with and contrary to, 42 U.S.C. §§ 1981, 2000(d) and 2000(e) of the 1964 Civil Rights Act.

II

Defendant admits the allegations of paragraphs II, III, IV, V, and VII of the Complaint, except that defendant alleges that he is charged with the duty of administering the laws of the State of Arizona pertaining to public welfare subject to control and direction of the Arizona State Board of Public Welfare.

III

Defendant denies the allegations of paragraphs VI and VIII of the complaint.

IV

Defendant denies each and every allegation of the complaint not specifically admitted herein.

WHEREFORE defendant prays that the complaint be dismissed and for such other and further relief as may be proper.

GARY K. NELSON
The Attorney General

/s/ Michael S. Flam
Michael S. Flam, Special
Assistant Attorney General

/s/ Andrew W. Bettwy
Andrew W. Bettwy
Assistant Attorney General
Attorneys for Defendant

STATE OF ARIZONA)
) ss
COUNTY OF MARICOPA)

JOHN O. GRAHAM, being first duly sworn, upon oath, deposes and says:

That he is the defendant in the above entitled action; that he has read the foregoing Answer to First Amended Complaint and knows the contents thereof, and that the matters and things therein alleged are true except those matters alleged upon information and belief, and as to those matters, he believes them to be true.

/s/ John O. Graham
JOHN O. GRAHAM

Subscribed and sworn to before me this 17th day of March, 1970.

/s/ Norma R. Larson
Notary Public

My Commission expires:
June 25, 1972

Copy mailed this 17th
day of March, 1970 to:

Anthony B. Ching
Chief Trial Counsel
Legal Aid Society
112 West Pennington Street
Tucson, Arizona 85701
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, for herself and for all others similarly situated, Plaintiffs, vs. JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona, Defendant.	NO. CIV-69-158-TUC. — MOTION FOR SUMMARY JUDGMENT

COME NOW plaintiffs and pursuant to Rule 56 of the Federal Rules of Civil Procedure move this Court for summary judgment against the defendant for the reason that there is no controversy as to any material fact at issue, and that as a matter of law plaintiffs are entitled to relief.

The within memorandum of points and authorities, more fully stating the legal points relied upon by plaintiffs, is incorporated herein by reference as part of this motion.

DATED this 23rd day of September, 1969.

LEGAL AID SOCIETY OF THE PIMA COUNTY BAR ASSOCIATION

By: /s/
Anthony B. Ching
Chief Trial Counsel
112 West Pennington Street
Tucson, Arizona 85701
Attorneys for Plaintiffs

Copy of the foregoing mailed this
23rd day of September, 1969, to:

Sandra D. O'Connor
Assistant Attorney General
State of Arizona
State Capitol Building
Phoenix, Arizona 85007
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, for herself and for all others similarly situated, Plaintiffs, v. JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona, Defendant.	NO. CIV-69-158-TUC. — MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

FACTS

Examination of the pleadings filed herein shows that all the material facts alleged in the Complaint are admitted by the defendant. Thus, there remains but the determination by this Court, after the convention of a three-judge court under 28 U.S.C. 2281 and 2284, whether, as a matter of law, the plaintiffs are entitled to the relief prayed for in their Complaint.

Briefly, the undisputed facts are as follows:

The named plaintiff, CARMEN RICHARDSON, is an alien lawfully admitted to the United States under the laws of the United States. She has been continuously a resident of the State of Arizona for 13 years. Mrs. Richardson is 64 years and 9 months of age at the time of the filing of the Complaint. She will have fulfilled the age requirement for Old Age Assistance (OAA) in October of 1969. Presently she is permanently and totally disabled and would be eligible for assistance under the Aid to the Permanently and Totally Disabled (APTD) program but for the lack of fifteen year residency required under Arizona law. She is suffering irreparable injury as a result of her ineligibility to receive APTD assistance as presently she has no income whatsoever and exists on charity on the part of neighbors and friends.

ARGUMENT

I

ARIZONA'S STATUTE REQUIRING FIFTEEN YEARS DURATIONAL RESIDENCY IN THE UNITED STATES VIOLATES EQUAL PROTECTION OF LAWS AS TO INDIGENT RESIDENT ALIENS.

Arizona requires United States citizenship, or alternatively 15 years residence in the United States to qualify for OAA, AB, APTD, MAA and General Assistance.

A.R.S. § 46-233 A 1.

"A. No person shall be entitled to general assistance (which includes APTD) who does not meet and maintain the following requirement:

1. Is a citizen of the United States, or has resided in the United States a total of fifteen years."

The cites for the other programs are: for MAA, § 46-262.02 (2); for AB, § 46-272(4); and for OAA, § 46-252.

The Equal Protection Clause of the Fourteenth Amendment protects aliens as well as citizen. *Yick Wo v. Hopkins,* 118 U.S. 356, 369 (1886). The scope of equal protection extends to a guarantee that the state will not legislate across-the-board inequalities in economic opportunity and private employment. In *Truax v. Raich,* 239 U.S. 33 (1915), the Court struck down an Arizona law attaching criminal penalties to the employment of more than a fixed percentage of non-citizens in a business, arguing that this denied equal protection of the right to work.

In *Takahashi v. Fish and Game Commission,* 334 U.S. 410 (1948), the United States Supreme Court struck down a 1943 California law denying fishing licenses to aliens ineligible for American citizenship (the law first read "alien Japanese"— the effect was the same), quoting extensively from *Truax v Raich.* The Court recognized the right of states to exclude aliens from certain occupations and acitivities (sic) where a "special public

interest" was involved, but invalidated the law before it on a combination of grounds including equal protection. Whether the purpose of the statute was fish conservation or to discriminate against the Japanese, the Court held that there was no reasonable basis for the classification. The Court said (at pp. 418-19):

> "It does not follow . . . that because the United States regulates immigration and naturalization in part on the basis of race and color classifications, a state can adopt one or more of the same classifications to prevent lawfully admitted aliens within its borders from earning a living in the same way that other state inhabitants earn their living."

California also claimed that it was protecting its fish, of which the citizens of the state were collectively the owners.

> "To whatever extent the fish in the three-mile belt off California may be capable of ownership by California, we think that ownership is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so." (At p. 421)

Another very helpful case has just come out of the California Supreme Court. In *Purdy & Fitzpatrick v. California,* 38 U.S.L.W. 2073 (Calif. Sup. Ct. 7/1/69), 455 P.2d 645, a state statute barring employment of aliens on non-emergency public works projects was held invalid. The Court relied on equal protection and federal preemption grounds; rejected state arguments based on protecting citizens from economic competition, use of public funds, and proprietary power in employment; and found no relationship between the classification and the area of public works employment.

On the other hand, the use and allocation of public wealth and resources is an area in which discrimination against aliens has been sustained on the basis of reasonable classification. The line of cases begins with early holdings that the states may restrict the enjoyment of their natural resources to their own citizens. *McCreedy v. Virginia,* 94 U.S. 391 (1876) (only Virginia citi-

zens could plant oysters in a Virginia tidewater river by state law); *Patsone v. Pennsylvania,* 232 U.S. 138 (1914) (a state could bar aliens from hunting game to conserve game for citizens). These precedents have been weakened considerably. See *Takahashi, supra.*

Another group of cases involves state laws restricting the right of aliens to own land. The power of states to control the devolution and ownership of real property even to the extent of barring certain aliens has been upheld. *Terrace v. Thompson,* 263 U.S. 197 (1923). The power has, however, since been weakened, *Oyama v. California,* 332 U.S. 633 (1948), and is questioned in *Takahashi* at 422. These cases are in any event based on "reasons peculiar to real property." *Takahashi* at 422.

One argument which may be raised as a possible reason for discrimination against aliens is that they have not made as great a contribution to the state as have the citizens.

The answer to this argument is in large measure provided in *Shapiro v. Thompson,* 394 U.S. 618 (1969), invalidating state residency requirements for welfare recipients. The Court pointed out that long-term residents are not making a greater present contribution to the state economy than short-term residents who are equally in need of public assistance, and that even if it could be factually shown that long-term residents had made a greater past contribution to the state economy, such considerations are equally invalid as a basis for welfare eligibility as for receiving public services such as education, parks, and fire and police protection. While this case deals with discrimination among state citizens, the same considerations apply to aliens who are equally entitled to public services and are protected under the Equal Protection Clause. *Thompson* also disposed of the argument that the states may erect residence requirements in order to discourage immigration to the state for the purposes of receiving higher welfare benefits; the Court argued that the statutes before it were not sufficiently tailored to that objective, which of itself is probably unconstitutional. In the case of aliens, it may be argued that the

federal government, in its control of immigration, provides the appropriate safeguards against an influx of immigration for the purposes of collecting public assistance, and that the states are therefore not justified in creating what amounts to a nonrebuttable presumption that any resident alien, or one who has been in the United States for less than fifteen years, has entered solely for this purpose.

It is important to note in this regard that the public funds used to pay for public assistance are not necessarily received only from citizens. In Arizona, state taxes earmarked for welfare assistance are payable by aliens as well as citizens. Moreover, aliens pay taxes to the federal government, which pays a very substantial percentage of the cost of public assistance. The dubious rationale of conserving the state's resources to state citizens certainly should not extend to empowering the states to deny to some residents the benefit of federal resources.

In *Purdy & Fitzpatrick, supra,* the California Supreme Court explains:

> "May the state simply favor its own citizens in the disbursement of public funds? First, since aliens support the State of California with their tax dollars, any preference in the disbursement of public funds which excludes aliens appears manifestly unfair. Second, Section 1850 prevents aliens from receiving the federal funds which largely support the construction of our highways and other projects; the state can urge no claim to a "proprietary interest" in such federal funds. Finally, any classification which treats all aliens as undeserving and all United States citizens as deserving rests upon a very questionable basis. The citizen may be a newcomer to the state who has little "stake" in the community; the alien may be resident who has lived in California for a lengthy period, paid taxes, served in our armed forces, demonstrated his worth as a constructive human being, and contributed much to the growth and development of the state."

The Court reversed a prior decision, which upheld Section 1850 —partially on the basis of *Crane v. New York,* 239 U.S. 195 (1915):

". . . for two reasons: first, the case of *Takahashi v. Fish and Game Comm.* . . . has cast doubt upon the vitality remaining in these earlier decisions; and second, developments in the law of equal protection requires us to reexamine the bases underlying the holdings of those cases."

The right to travel freely within the United States without restriction or limitation is a fundamental right of U. S. citizens. *Passenger Cases,* 7 How. 243 (1849); *U. S. v. Guest,* 383 U.S. 745 (1966). Legislation designed to chill this right is unconstitutional. *U. S. v. Jackson,* 390 U.S. 570 (1968). Along with equal protection, the right to travel plays an important role in *Shapiro v. Thompson, supra,* which, along with *Edwards v. California,* 314 U.S. 160 (1941), holds that a state may not seek to discourage the in-migration of indigent persons simply because they are indigent. This is the effect of the residence requirements struck down in *Shapiro v. Thompson.*

The same principle may be applied to aliens. So far as special residence requirements for aliens are concerned, it may be argued that such requirements not only deny equal protection as between citizens and aliens, but also constitute a residence (as opposed to citizenship) requirement which exceeds the maximum permissible under the Social Security Act prior to *Shapiro v. Thompson.* More generally (and exclusively where an absolute citizenship requirement is imposed), the argument goes like this: the federal government has broad and exclusive power to regulate immigration and the conditions under which aliens may reside within the United States; the states may neither add to nor alter the regulations of the federal government in this area; and any state which enacts a provision making it especially difficult (or impossible) for indigent aliens to receive public assistance is restricting their freedom to move to that state in contravention of the right, conferred by the federal government in admitting resident aliens, to travel and live in any state in the Union.

II

THE FIELD OF REGULATING ALIENS IS PRE-EMPTED BY THE FEDERAL GOVERNMENT.

Takahashi at 415-16 says of *Truax v. Raich*:

> "This Court . . . declared that Raich, having been lawfully admitted into the country under federal law, had a federal privilege to enter and abide in 'any State of the Union' and thereafter under the Fourteenth Amendment to enjoy equal protection of the laws of the state in which he abided."

This included the right to work.

> " 'The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality.' " *Truax v. Raich* at 42.

The Court, in *Takahashi,* continued (at 419):

> "The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, ... Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization, and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration. . . ."

Federal immigration law provides for the deportation of a resident alien who becomes a public charge within five years after his entry into the United States from causes not affirmatively shown to have arisen after his entry. Provision is also made for deporta-

tion where a person was admitted although actually excludable; among the classes of excludable aliens are those "likely at any time to become public charges." 8 U.S.C. §§ 1182, 1251. These provisions provide the basis for numerous arguments: (1) Any state legislation is superfluous, if not an invasion of a federally pre-empted area; (2) any state requirement above five years is a clear invasion of an area of federal legislation and an interference with it; (3) with respect to aliens who become public charges due to reasons arising after their immigration, any residence requirement would be in conflict with the design of the federal immigration laws; (4) States may not be heard to argue that citizenship requirements are designed to discourage immigration for the purpose of collecting welfare benefits, since admission as resident aliens implies a federal determination that immigrants are not likely to become public charges; and (5) the federal provision may be a basis for setting five years as a "reasonable" residence requirement for aliens.

III

ARIZONA'S FIFTEEN YEAR DURATIONAL RESIDENCY REQUIREMENT FOR ALIENS VIOLATES THE SOCIAL SECURITY ACT.

The purpose of APTD is to "furnish financial assistance . . . to needy individuals . . . who are permanently and totally disabled etc." 42 U.S.C. § 1351.

On its face, this purpose is not served by excluding from the benefits of APTD needy individuals solely because they are not citizens of the United States (and have not resided in the United States for fifteen years). Rather, this purpose is defeated with respect to needy individuals who fall within the disfavored classification.

42 U.S.C. § 1352(b) prohibits (1) any state residency requirement of more than five years during the immediate nine preceding years, and (2) any citizenship requirement.

The prohibition as to the citizenship requirement apparently was intended to eliminate distinctions between native-born and naturalized citizens and therefore is irrelevant for the discussion here. Whether or not the reference to the five-year residency requirement was indirectly answered by *Shapiro v. Thompson, supra,* (in discussing a similar provision — AFDC),

> "On its face, the statute does not approve, much less prescribe, a one-year requirement. It merely directs the Secretary of Health, Education and Welfare not to disapprove plans submitted by the States because they include such a requirement.... But even if we were to assume, *arguendo,* that Congress did approve the imposition of a one-year waiting period, it is the responsive *state* legislation which infringes constitutional rights. By itself Sec. 402(b) has no absolutely restrictive effect. It is therefore not that statute but only the state requirements which pose the constitutional question. Finally, even if it could be argued that the constitutionality of Sec. 402(b) is somehow at issue here, it follows from what we have said that the provision, insofar as it permits the one-year waiting-period requirement, would be unconstitutional. Congress may not authorize the States to violate the Equal Protection Clause." *Shapiro v. Thompson,* 394 U.S. at ....., 89 S.Ct. 1334, 1335.

Assuming, in arguendo, that a durational residency requirement is not repugnant to the Equal Protection Clause, it is plain that Congress, under the Social Security Act, does not permit the fifteen years in the United States requirement that is imposed by Arizona. The State statute being in conflict with the federal law, it must fail and is null and void. *King v. Smith,* 392 U.S. 309 (1968).

DATED this 23rd day of September, 1969.

LEGAL AID SOCIETY OF THE PIMA COUNTY BAR ASSOCIATION

By: /s/ .....

Anthony B. Ching
Chief Trial Counsel
112 West Pennington Street
Tucson, Arizona 85701
Attorneys for Plaintiffs

Copy of the foregoing mailed this
23rd day of September, 1969, to:

Sandra D. O'Connor
Assistant Attorney General
State of Arizona
Capitol Building
Phoenix, Arizona 85007
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, Plaintiff, vs. JOHN O. GRAHAM, Defendant.	NO. CIV-69-158-TUC. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The Defendant moves this Court to deny the Plaintiff's Motion for Summary Judgment herein and moves this Court for summary judgment against the Plaintiff for the reason that there is no controversy as to any material fact at issue, and that as a matter of law Defendant is entitled to relief.

The Defendant's Memorandum of Points and Authorities is attached hereto and incorporated herein in support of Defendant's counter Motion for Summary Judgment and as and for his Response to Plaintiff's Motion for Summary Judgment.

DATED this 3rd day of October, 1969.

GARY K. NELSON
The Attorney General

/s/ SANDRA D. O'CONNOR
Assistant Attorney General
Attorneys for Defendant

COPY of the foregoing mailed this
3rd day of October, 1969, to:

Mr. Anthony B. Ching
Chief Trial Counsel
Legal Aid Society of the
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112 West Pennington Street
Tucson, Arizona 85701
Attorneys for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

FACTS

Defendant does not dispute the Plaintiff's statement of facts as set forth in her Memorandum, except that Defendant denies that Plaintiff is suffering irreparable injury as a result of her ineligibility to receive APTD assistance.

ARIZONA'S STATUTORY DURATIONAL RESIDENCE REQUIREMENTS DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE AS TO INDIGENT RESIDENT ALIENS

Most of Arizona's categorical welfare assistance statutes extend eligibility for welfare assistance only to citizens of the United States to persons who have resided in the United States a total of fifteen years. A.R.S. § 46-252(a), old age assistance; A.R.S. § 46-272(4), aid to blind; A.R.S. § 46-233(A)(1), aid to permanently and totally disabled; A.R.S. § 46-261.02(2), medical assistance to the aged.

The United States Supreme Court declared unconstitutional durational residence requirements for certain classes of welfare assistance recipients in *Shapiro v. Thompson,* 394 U.S. 618 (1969). (This Court, based on the *Shapiro* decision, held unconstitutional A.R.S. §§ 46-233(A)(2), 46-252(3). *Porter v. Graham,* No. Civ-2348 Tucson). However, the Supreme Court rested its decision on the fundamental right of interstate movement. The Court stated, at pp. 629, 633:

> "The court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all *citizens* be free to travel throughout the length and breadth of our land. . . .
>
> "We recognize that a state has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance,

public education or any other program. But a state may not accomplish such a purpose by invidious distinctions between classes of its *citizens.*" (Emphasis added.)

Thus, the language of the *Shapiro* majority opinion is to the effect that it rested on the fundamental right of *citizens* to travel.

As pointed out in Plaintiff's Memorandum of Points and Authorities, the Supreme Court has held that a state may restrict the distribution of the public domain and the public resources to the citizens of the state, even though it cannot prohibit or restrict the economic right of aliens to earn a living. *Truax v. Raich,* 239 U.S. 33, at pp. 39, 40 (1915).

See also *McCready v. Virginia,* 94 U.S. 391 (1876), upholding state law restricting right to plant oysters in state waters to state citizens; *Patsone v. Pennsylvania,* 232 U.S. 138 (1914), upholding state law barring aliens from hunting game; *Terrace v. Thompson,* 263 U.S. 197 (1923), upholding state limitations on rights of aliens to inherit real property.

Even though the equal protection clause of the Fourteenth Amendment extends to all persons, including aliens, the cases cited above and the case of *Harisiades v. Shaughnessy,* 342 U.S. 580 (1952), demonstrate that some areas of disparity remain. Aliens are not treated as citizens in certain areas and respects. Thus, as stated in the *Harisiades* opinion at pp. 586, 587,

"Under our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen. . . .

"Footnote 9. This Court has held that the Constitution assures him a large measure of equal economic opportunity, *Yick Wo v. Hopkins,* 118 U.S. 356; *Truax v. Raich,* 239 U.S. 33; he may invoke the writ of habeas corpus to protect his personal liberty, *Nishimura Ekiu v. United States,* 142 U.S. 651, 660; in criminal proceedings against him he must be accorded the protections of the Fifth and Sixth Amendments, *Wong Wing v. United States,* 163 U.S. 228; and, unless he is an enemy alien, his property cannot be taken without just compensation *Russian Volunteer Fleet v. United States,* 282 U.S. 481.

"Footnote 10. He cannot stand for election to many public offices. For instance, Art. I, § 2, cl. 2, § 3, cl. 3, of the Constitution respectively require that candidates for election to the House of Representatives and Senate be citizens. See Borchard, Diplomatic Protection of Citizens Abroad, 63. The states, to whom is entrusted the authority to set qualifications of voters, for most purposes require citizenship as a condition precedent to the voting franchise. The alien's right to travel temporarily outside the United States is subject to restrictions not applicable to citizens. 43 Stat. 158, as amended, 8 U.S.C. § 210. If he is arrested on a charge of entering the country illegally, the burden is his to prove 'his right to enter or remain'— no presumptions accrue in his favor by his presence here. 39 Stat. 889, as amended, 8 U.S.C. § 155(a)."

As stated in 69 Yale L. J. 262, 281, "The implicit assumption underlying the entire *{Harisiades}* opinion was finally stated explicitly: constitutionally, permanent residence short of naturalization is merely temporary residence." If this be true, neither *Shapiro v. Thompson* nor *Porter v. Graham* can be interpreted as requiring the state to extend welfare benefits to temporary residents of the state.

THE FEDERAL GOVERNMENT HAS NOT PREEMPTED THE FIELD

Despite the suggestion in *Takahashi v. Fish and Game Commission,* 334 U.S. 410 (1948), that the federal government has the sole and exclusive power over aliens, the Social Security Act appears to give congressional consent to the states to adopt restrictive welfare eligibility statutes as to aliens. Thus, the various provisions of the Social Security Act, setting forth the requirements of state plans for categorical assistance programs, provide that the Secretary of Health, Education and Welfare shall not approve any state plan which imposes as a condition of eligibility "any citizenship requirement which excludes any *citizen* of the United States." (Emphasis added). 42 U.S.C. §§ 302, 602, 1202, 1353, 1382.

This case appears to be one of first impression. To hold that Arizona cannot impose its statutory durational residency requirement as to aliens will only serve to further dilute the already limited amount of funds available for welfare benefits. The older cases dealing with rights of aliens have indicated that states have certain powers to exclude aliens from sharing in the public resources belonging to the citizens of the state. Although some more recent decisions have weakened the earlier cases, they have not been overruled. Plaintiff's Motion for Summary Judgment should be denied and judgment entered for the Defendant.

Dated this 3rd day of October, 1969.

Respectfully submitted,

GARY K. NELSON
The Attorney General

/s/ SANDRA D. O'CONNOR
SANDRA D. O'CONNOR
Assistant Attorney General
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, for herself and for all others similarly situated, Plaintiffs, v. JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona, Defendant.	NO. CIV-69-158-TUC. — SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Defendant respectfully submits the following Memorandum of Points and Authorities as a supplement to the Memorandum previously attached to and incorporated in Defendant's Motion for Summary Judgment in the above captioned matter:

Alien affairs is an area over which Congress has exclusive and complete power:

". . . Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government . . . that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government . . ." *Galvan v. Press,* 347 U.S. 522 (1954).

42 U.S.C. § 1352 provides in part as follows:

". . . (The Secretary) shall not approve any plan for which imposes, as a condition of eligibility for aid to the permanently and totally disabled under the plan . . .

"Any citizenship requirement which excludes any citizen of the United States."

There are similar provisions for Old Age Assistance, 42 U.S.C. § 302(b)(3); Aid to the Blind, 42 U.S.C. § 1202(b)(2); Aid to the Aged, Blind or Disabled, 42 U.S.C. § 1382(b)(2). How-

ever, there is no citizenship provision for Aid to Families with Dependent Children set forth in the Social Security Act. Accordingly, there is no citizenship provision under state law.

In that same chapter of the United States Code, the following section appears:

> ". . . (T)he Secretary of Health, Education and Welfare . . . shall make and publish such rules and regulations . . . as may be necessary to the efficient administration of the functions with which . . . (he) . . . is charged under this chapter." § 1302, U.S.C.

Pursuant to its duties under § 1302, *supra,* the Secretary of Health, Education and Welfare has published § 201.3(d), Title 45, Code of Federal Regulations, which reads as follows:

> "Determinations as to whether State plans . . . originally (sic) meet, or continue to meet, the requirements for approval are based on relevant Federal statutes and regulations and *the requirements and policies set forth in the Handbook of Public Assistance Administration* and other official issuances to the States." (Emphasis added)

The Handbook of Public Assistance Administration is published by a division of the Department of Health, Education and Welfare. The Handbook states that it is "the official medium for issuance of interpretations and instructions concerning requirements of the public assistance titles of the Social Security Act and recommendations for the administration of State public assistance programs;" and the United States Supreme Court has indicated that the state plans of public assistance "must conform with the several requirements of the Social Security Act and with the rules and regulations promulgated by HEW." *King v. Smith,* 88 S.Ct. at 2133.

Sections 3720 and 3730, Part IV, of the Handbook read respectively as follows:

> "A State plan under titles I, X, XIV (aid to permanently and totally disabled) and XVI may not impose, as a condition of eligibility, any citizenship requirement which excludes any citizen of the United States." (expression in parentheses added).

"Where there is an eligibility requirement applicable to noncitizens, *State* plans *may,* as an alternative to excluding all noncitizens, *provide for qualifying noncitizens, otherwise eligible, who have resided in the United States for a specified number of years.*" (emphasis added)

As evidenced by the policies outlined in the above-quoted statutes and regulations, Congress BY ITSELF AND THROUGH THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE (the government agency designated to administer the provisions of the Social Security Act) has authorized the states to require citizenship as a basis for eligibility for welfare benefits.

Plaintiff has cited to this Court numerous decisions in which state eligibility requirements on the basis of citizenship have been declared violative of the United States Constitution, particularly the Equal Protection Clause of the 14th Amendment; it should be noted in those cases, however, that no congressional authorization for the particular state legislation was present as in the case now before this Court.

In addition to the specific congressional authorization for a citizenship eligibility requirement, the United States Supreme Court has long recognized the power and duty of the states to regulate the distribution of the public wealth. *Truax v. Raich,* 239 U.S. 33; *Shapiro v. Thompson,* 89 S.Ct. 1322 (1969).

". . . The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other states . . ." *Truax v. Raich, supra.*

The need to preserve fiscal integrity in public assistance programs in the case of noncitizens, an area exclusively within congressional control, involves serious questions of national security.

Respectfully submitted this 24th day of February, 1970.

GARY K. NELSON
The Attorney General

/s/ Michael S. Flam
Michael S. Flam, Special
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1624 West Adams
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Copy mailed Air Mail
Special Delivery this
24th day of February,
1970 to:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, for herself and for all others similarly situated, Plaintiffs, vs. JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona, Defendant.	NO. CIV-69-158-TUC. — PLAINTIFFS' RESPONSE TO DEFENDANT'S SUPPLEMENTAL MEMORANDUM OF LAW

Research into the legislative history of 42 U.S.C. § 1352 (b)(2), by counsels for both sides, indicated that there was no reference as to the Congressional intent concerning this paragraph during the adoption of the APTD program in 1950. The language of this paragraph is similar to a comparable paragraph found in 42 U.S.C. § 302(b)(3), as passed by Congress in 1935 when the Social Security Act was first adopted. House Report No. 615, concerning the Social Security Act in its relevant portion, indicates that the intent was that states may choose whether or not they wish to assist aliens (see attached Exhibit 1).

It is important to note that the same House Report permits states to impose moral character as a factor in determining eligibility. This, we know, was found to be no longer the Congressional intent when one examines the historical development of our welfare program since 1935, *King v. Smith,* 392 U.S. 309 (1967). The same is true here, since the disappearance of the notion of "worthy poor" as outlined in *King v. Smith* applies with equal force to all the federally assisted categorical assistance programs under the Social Security Act.

The above argument is strengthened by the fact that the case of *Takahashi v. Fish and Game Commission,* 334 U.S. 410, was decided in 1948, some 13 years after the original enactment of

the Social Security Act. As we learn in reading *Takahashi*, the Supreme Court held in that case that a state may not discriminate against a resident alien in the sharing of its wealth under the equal protection clause. A fortiorari, it can be concluded that had Congress known in 1935 that the equal protection clause applies to the question of wealth, it would not have permitted the discrimination against resident aliens.

Therefore, the reliance by defendant on the Social Security Act is unfounded. As Mr. Justice Brennan said in *Shapiro v. Thompson*:

> "Congress may not authorize the States to violate the Equal Protection Clause. Perhaps Congress could induce wider state participation in school construction if it authorized the use of joint funds for the building of segregated schools. But could it seriously be contended that Congress would be constitutionally justified in such authorization by the need to secure state cooperation? Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause. *Katzenbach v. Morgan*, 384 U.S. 641, 651, n. 10 (1966)."

DATED this 12th day of March, 1970.

LEGAL AID SOCIETY OF THE PIMA COUNTY BAR ASSOCIATION

By: ANTHONY B. CHING
Anthony B. Ching
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Copy of the foregoing mailed this
12th day of March, 1970, to:

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Attorneys for Defendant

EXHIBIT 1

74th Congress *1st Session*

HOUSE OF REPRESENTATIVES

Report No. 615

THE SOCIAL SECURITY BILL

April 5, 1935.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

Mr. Doughton, from the Committee on Ways and Means, submitted the following

REPORT

[To accompany H. R. 7260]

The Committee on Ways and Means, to whom was referred the bill (H. R. 7260) to provide for the general welfare by establishing a system of Federal old-age benefits, and by enabling the several States to make more adequate provision for aged persons, dependent and crippled children, maternal and child welfare, public health, and the administration of their unemployment compensation laws, to establish a Social Security Board, to raise revenue, and for other purposes, having had the same under consideration, report it back to the House without amendment and recommend that the bill do pass.

PART I. GENERAL STATEMENT

CONTENTS OF BILL

This bill provides for various grants-in-aid to the States; establishes a Federal old-age benefit system and a Social Security Board; and imposes certain taxes, hereinafter described.

Title I: Grants-in-aid are to be made to the States for old-age pensions to persons who have reached the age of 65. In making these grants the Federal Government will match what the States put up, within certain limits.

Title II: A system of Federal old-age benefits, payable to people who have reached the age of 65, will begin in 1942. These benefits are to be measured by wages, and are payable wholly regardless of the need of the recipient.

Title III: Grants-in-aid are made to the States, to pay the administrative costs of State unemployment compensation systems. The . . . .

18 THE SOCIAL SECURITY BILL

(b): Liberality of certain eligibility requirements:

(1): A person shall not be denied assistance on the ground that he is not old enough to be eligible for it, if in fact he has reached the age of 65 years. Until 1940, however, a State may set the age limit as high as 70 years.

(2): A person shall not be denied assistance on the ground that he has not been a resident long enough, if in fact he has lived in the State for 1 year immediately preceding his application, and for any 5 years out of the 9 years immediately preceding his application. Thus, if the plan is administered by counties, it may impose requirements as to county residence; but no county residence requirement may result in denying assistance to an otherwise qualified person who has resided in the State for the period just mentioned. Even if the county residence requirements are stricter than those allowed under this section, such a person must be entitled to assistance under the plan, presumably directly from the State. (No State is required to give assistance to nonresidents of the State.)

(3): A person shall not be denied assistance on the ground that he has not been a United States citizen for a number of years, if in fact, when he receives assistance, he is a United States citizen. This means that a State may, if it wishes, assist only those who are citizens, but must not insist on their having been born citizens or on their having been naturalized citizens for a specified period of time.

The limitations of subsection (b) do not prevent the State from imposing other eligibility requirements (as to means, moral character, etc.) if they wish to do so. Nor do the limitations of sub-

section (b) mean that the States must adopt eligibility requirements just as strict as those enumerated. The States can be more lenient on all these points, if they wish to be so.

PAYMENT TO STATES

Section 3: The Federal Government will match what the States put up for old-age assistance, by paying quarterly to each State one-half of the total amount paid as assistance to people in the State who are at least 65 years old and who are not inmates of public institutions. (If the State wishes to pay pensions with respect to aged people over 65 in private institutions, the Federal Government will match those payments; but it will not match payments to persons less than 65, or to persons in public institutions.) Federal payments with respect to any person, however, will not be more than $15 per month. If the State gives a pension of $20 the Federal Government will pay half of it; of $30, the Federal Government will pay half of it; of $40, the Federal Government will match only the first $15 put up by the State, so that the Federal share will be $15 and the State will put up the other $25. Federal payments shall be made on a prepayment basis, on the strength of estimates by the State and the Board, with later adjustments if the actual expenditures differ from the estimates. The Federal Government will also help the States to meet administrative costs, paying therefor an additional amount equal to 5 percent of the regular quarterly payment to the State. All these payments, and all other payments under this bill, are to be made without a prior audit by the General Accounting Office; but there will be a postaudit. It is understood by the committee that, in the case of grants to States, the General Accounting Office, in making . . . .

Additional case cited in open court at hearing on February 27, 1970.

[¶ 9385] Paul Guzman, Plaintiff v. Polich and Benedict Construction Company, Inc., Defendant.

United States District Court, Central District California. No. 69-1802-F. January 12, 1970.

Title VII — Civil Rights Act of 1964

Discrimination on Basis of National Origin — Public Works — State Law Barring Hiring of Aliens.— Provisions of the California Labor Code that make it unlawful for contractors and subcontractors to knowingly hire any alien to work on any public works projects deprive resident aliens of liberty and property without due process of law in violation of the Fourteenth Amendment to the federal Constitution and the California Constitution, and are superseded by Title VII of the 1964 Civil Rights Act which bars job bias on the basis of national origin. Accordingly, an employer's action in refusing to hire aliens because of the requirements of the state law constituted discrimination against aliens based on place of national origin and was an unlawful employment practice within the meaning of Title VII of the 1964 Civil Rights Act.

Back reference. — ¶ 1220.

Anthony Michael Glassman, Miller, Glassman & Browning, for Plaintiff.

Theodore P. Polich, Jr., Morris & Polich, for Defendant.

[*Nature of Case*]

FERGUSON, D. J.: The instant proceeding involves a civil action filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5.

I. Plaintiff, the assistant representative of Laborer's International Union of North America, Local Union No. 652, filed this action on his own behalf and on behalf of all other persons whom he represents and who are similarly situated pursuant to Rule 23, Federal Rules of Civil Procedure. Plaintiff alleged that acting in the above mentioned capacity he referred four alien members of his Local No. 652 to Defendant company for employment. Plaintiff also alleges that all four members of said local were refused employment by Defendant company because they were not citizens of the United States and that if Defendant company were to hire said aliens they would be in violation of Section 1850 of the Cali-

fornia Labor Code which provides that contractors and sub-contractors shall not knowingly employ or cause to be employed any alien on any public works project.

Employment Practices Cases

Guzman v. Polich & Benedict Construction Co., Inc.

[*Conclusions of Law*]

The Defendant, having admitted by stipulation to the truth of the factual allegations contained in the Complaint on file herein, the Court makes the following conclusions of law:

1. The Court has jurisdiction of this action pursuant to the provisions of Section 706(f) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e-5(f).

2. Defendant company is an employer within the meaning of Sections 701(b) and 703(a) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. Sections 2000e and 2000e-2).

3. Plaintiff has complied with all procedural requirements under the Civil Rights Act of 1964 necessary for the commencement and maintenance of this action.

4. This action presents an actual controversy between the parties hereto as contemplated by 28 U.S.C. Section 2201.

5. Defendant company, in refusing to hire said aliens because of the requirements of Sections 1850-1854 of the California Labor Code, discriminated against said aliens and deprived them of an equal employment opportunity.

6. The California Labor Code Sections 1850-1854 which dictated Defendant's course of action deprive Plaintiff and all others similarly situated of liberty and property without due process of law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States and the California Constitution.

7. Said statutory provisions are declared to be unconstitutional under the authority of *Purdy & Fitzpatrick v. State of California,* 71 A.C. 587 (1969).

8. California Labor Code Sections 1850-1854 are declared to be superseded by the later enactment by the United States Congress of the Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e. Title VII supersedes all inconsistent State laws. *Rosenfeld v. Southern Pacific Company,* 293 F. Supp. 1219 (C.D. Cal. 1968); *Richard v. Griffith Rubber Mills,* [60 LC ¶ 9243] 300 F. Supp. 338 (D. Ore. 1969).

9. All aliens residing within the United States are declared to be within the protection of the national origins provisions of Title VII.

10. Defendant company shall not be barred by the doctrine of res judicata or collateral estoppel, or otherwise, from defending against any legal action by Plaintiff or the class represented in this action by reason of these conclusions of law or by the following judgment.

[*Judgment*]

Wherefore, Plaintiff is entitled to judgment against Defendant company as follows:

(a) Declaring that Sections 1850-1854 of the California Labor Code are unconstitutional and are contrary to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e);

(b) Declaring that California Labor Code Sections 1850-1854 are superseded by Title VII of the Civil Rights Act of 1964;

(c) Declaring that Defendant company's action in refusing to hire said aliens because of the requirements of Sections 1850-1854 of the California Labor Code constituted discrimination against said aliens based on place of national origin and is an unlawful employment practice within the meaning of Title VII of the Civil Rights Act of 1964;

(d) That Plaintiff and all other persons similarly situated shall be considered for any position sought by them without regard to place of national origin or any limitations imposed by employers under or pursuant to Sections 1850-1854 of the California Labor Code or any administrative regulations issued pursuant thereto;

(e) That Defendant company, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise, be forever restrained and enjoined in the conduct of its employment practices with respect to Plaintiff, and all others similarly situated from relying upon, or acting under, the provisions of California Labor Code Sections 1850-1854 or any administrative regulations issued under or pursuant thereto;

(f) Declaring that all aliens residing within the United States of America are declared to be within the protection of the national origins provisions of Title VII; and

(g) Declaring that Defendant company shall not be barred by the doctrine of res judicata or collateral estoppel, or otherwise, from defending against any legal action by Plaintiff or the class represented in this action by reason of these conclusions of law or by the following judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, for herself and for all others similarly situated,
Plaintiff,
vs.
JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona,
Defendant.

NO. CIV-69-158-TUC.

—

OPINION AND ORDER

MUECKE, D. J.

The undisputed facts are:

The named plaintiff, Carmen Richardson, is an alien lawfully admitted to the United States under the laws of this country. She has been continuously a resident of the State of Arizona for thirteen years. Mrs. Richardson was sixty-four years and nine months of age at the time of the filing of the complaint. She fulfilled the age requirement for Old Age Assistance (OAA) in October of 1969. Presently, she is permanently and totally disabled and would be eligible for assistance under the Aid to the Permanently and Totally Disabled (APTD) program but for the fifteen-year residency requirement of Arizona law. By reason of this law, she is ineligible to receive APTD assistance and suffers irreparable injury, as presently she has no income whatsoever and exists on charity on the part of neighbors and friends.

Plaintiff, in this class action, attacks the constitutionality of three provisions of Arizona welfare law: (1) General assistance;[1] (2) Assistance for the blind;[2] and (3) Old age assistance.[3]

[1]A.R.S. § 46-233. *Eligibility for general assistance*

A. No person shall be entitled to general assistance who does not meet and maintain the following requirement:

1. Is a citizen of the United States, or has resided in the United States a total of fifteen years.

(Continued on Page 45)

The Court has jurisdiction of this action by virtue of 42 U.S.C. § 1983 (Civil Rights Act of 1871), 28 U.S.C. § 1343 (Civil Rights), 28 U.S.C. §§ 2201 and 2202 (Declaratory Judgments Act), and 28 U.S.C. §§ 2281 and 2284 (Three Judge Courts).

The claimed infirmity in all the Arizona statutes is that a fifteen-year residency requirement for resident aliens violates the constitutional right to travel, *Shapiro v. Thompson,* 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed. 2d 600 (1969); the Social Security Act; and, even though Congress may have empowered the states to act in this area, the equal protection clause of the Fourteenth Amendment. It is also argued that the field of regulating aliens has been preempted by the federal government.

42 U.S.C. § 1352(b)(2) provides that "[t]he Secretary [of Health, Education and Welfare] shall approve any welfare plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes as a condition of eligibility for aid to the permanently and totally disabled under the plan . . . [a]ny citizenship requirement which excludes any citizen of the United States."

There are similar provisions for Old Age Assistance, 42 U.S.C. § 302(b)(3); Aid to the Blind, 42 U.S.C. § 1202(b)(2); Aid to the Aged, Blind or Disabled, 42 U.S.C. § 1382(b)(2).

In the same title of the United States Code, § 1302, Congress authorized the Secretary of Health, Education and Welfare to make such rules as may be necessary to the administration of the Welfare Act. Pursuant to this authority, the Secretary has pub-

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[2]A.R.S. § 46-272. *Eligibility for blind assistance*
Assistance shall be granted to any person who meets and maintains the following requirement:
4. Is a citizen of the United States, or has resided in the United States a total of fifteen years.

[3]A.R.S. § 46-252. *Eligibility for old age assistance*
Assistance shall be granted under this article to any person who meets and maintains the following requirement:
2. Is a citizen of the United States, or has resided in the United States a total of fifteen years.

lished a Handbook of Public Assistance Administration.[4] Sections 3720 and 3730, Part IV of this Handbook read respectively as follows:

> "A state plan under titles I, X, XIV [aid to permanently and totally disabled] and XVI may not impose, as a condition of eligibility, any citizenship requirement which excludes any citizen of the United States."

> "Where there is an eligibility requirement applicable to noncitizens, State laws may, as an alternative to excluding all noncitizens, provide for qualifying noncitizens, otherwise eligible, who have resided in the United States for a specified number of years."

Relying on the statutes and the regulations cited, the State herein argues that Congress by itself and through the Department of Health, Education and Welfare has authorized the States to require citizenship as a basis for eligibility for welfare benefits. In other words, the State takes the position that either no welfare benefits need be given resident aliens or else a residency requirement may be imposed as is the case here.

Buttressing this view, according to the State, is the United States Supreme Court decision in *Traux v. Raich,* 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed 131 (1915), wherein it is stated:

> "... The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens as against both aliens and citizens of other states. . . . *"Traux v. Raich,* 239 U.S. at 39, 36 S.Ct. at 10, 60 L.Ed at ."

Responding to such argument by the State, we hold that nothing in the explicit language of 42 U.S.C. § 1352(b)(2) and the related statutes authorizes any residency requirement such as is at issue here to be imposed by the states upon aliens. Insofar as the language of 42 U.S.C. § 1352(b)(2), 42 U.S.C. § 302(b)(3), 42 U.S.C. § 1202(b)(2), and 42 U.S.C. § 1382(b)(2) is

[4]See § 201.3(d), Title 45, Code of Federal Regulations.

construed to mean that the State is empowered to impose a fifteen-year residency requirement before an alien lawfully resident in the United States can receive aid, we further hold that such a construction is violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The quoted paragraph from *Traux v. Raich, supra,* is dicta not necessary to the decision in that case, and the language is too general to serve as authority to support the residency restriction here imposed. In any event, later decisions of the United States Supreme Court make clear the course to be followed in this case.

In *Shapiro v. Thompson, supra,* the Supreme Court discussed the equivalent provisions for Aid to Families with Dependent Children [§ 402(b)] which dealt with a one-year residency requirement.

> On its face, the statute does not approve, much less prescribe, a one-year requirement. It merely directs the Secretary of Health, Education, and Welfare not to disapprove plans submitted by the States because they include such a requirement . . .
>
> But even if we were to assume, *arguendo,* that Congress did approve the imposition of a one-year waiting period, it is the responsive *state* legislation which infringes constitutional rights. By itself § 402(b) has absolutely no restrictive effect. It is therefore not that statute but only the state requirements which pose the constitutional question.
>
> Finally, even if it could be argued that the constitutionality of § 402(b) is somehow at issue here, it follows from what we have said that the provision, insofar as it permits the one-year waiting period requirement, would be unconstitutional. Congress may not authorize the States to violate the Equal Protection Clause. *Shapiro v. Thompson, supra,* 394 U.S. at 639, 89 S.Ct. at 1334, 22 L.Ed.2d at . (emphasis in original).

No compelling state interest is argued which would mitigate in favor of a different result. Petitioner pays taxes into the coffers of the State. The "privilege" v. "right" argument does not answer the constitutional challenge. *Thompson, supra,* n.6, 394 U.S. at 627, 89 S.Ct. at 1327, 22 L.Ed.2d at . The "purpose of inhibit-

ing migration by needy persons into the State is constitutionally impermissible." *Thompson, supra,* 394 U.S. at 629, 89 S.Ct. at 1329, 22 L.Ed.2d at . Although the "State has a valid interest in preserving the fiscal integrity of its programs . . . it may not accomplish such a purpose by invidious distinctions . . ." *Thompson, supra,* 394 U.S. at 633, 89 S.Ct. at 1330, 22 L.Ed.2d at . *See also Dandridge v. Williams,* U.S. , 90 S.Ct. , L.Ed.2d , slip opinion at 13 (No. 131, April 6, 1970).

In light of *Takahashi v. Fish and Game Commission,* 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478 (1948) and *Shapiro v. Thompson, supra,* it necessarily follows that the Arizona statutes previously cited[3], imposing a fifteen-year residency requirement, are violative of the equal protection clause of the Fourteenth Amendment.

Accordingly, plaintiff's motion for summary judgment praying for a preliminary injunction and declaratory relief is granted.

DATED this 27 day of May, 1970.

GILBERT H. JERTBERG
Gilbert H. Jertberg, Circuit Judge

JAMES A. WALSH
James A. Walsh, District Judge

C. A. MUECKE
C. A. Muecke, District Judge

[3]A.R.S. 46-233, 46-272, and 46-252.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, for herself and for all others similarly situated, Plaintiff, vs. JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona, Defendant.	NO. CIV-69-158-TUC. — AMENDED JUDGMENT

This action came on for hearing on plaintiffs' motion for summary judgment and defendant's cross-motion for summary judgment before the Court, Honorable Gilbert H. Jertberg, Circuit Judge; Honorable C. A. Muecke, District Judge; and Honorable James A. Walsh, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered on May 27, 1970,

IT IS ORDERED AND ADJUDGED as follows:

(1) That pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, the action is to be maintained as a class action, all in accordance with Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure.

(2) That the class of plaintiffs is described as follows:

Those persons residing in the State of Arizona, who are not United States citizens, but who are lawfully admitted to the United States as permanent residents by the Federal government, who are otherwise eligible for old age assistance, general assistance, blind assistance and aid to the permanently and totally disabled public welfare programs under the laws of Arizona, but are precluded from obtaining these benefits solely because of

their being non-citizens and the lack of a total of fifteen years residency in the United States.

(3) That judgment be rendered in favor of the plaintiffs and against the defendant.

(4) That as to the plaintiffs, the United States citizenship requirement, as well as the fifteen-year durational residency requirement in the United States, as provided for in Arizona Revised Statutes §§ 46-233(A)(1), 46-252(2) and 46-272(4), as amended, are declared unconstitutional as violative of the due process clause and the equal protection clause of the Fourteenth Amendment to the United States Constitution.

(5) That defendant and his successors, agents and employees are hereby permanently enjoined from enforcing the United States citizenship requirement, as well as the fifteen-year durational residency requirement, as to the plaintiffs.

DATED this 26th day of June, 1970.

GILBERT H. JERTBERG
Gilbert H. Jertberg, Circuit Judge

JAMES A. WALSH
James A. Walsh, District Judge

C. A. MUECKE
C. A. Muecke, District Judge

APPROVED AS TO FORM:

GARY K. NELSON
The Attorney General

By: MICHAEL S. FLAM, 6/16/70
Michael S. Flam
Special Assistant Attorney General
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, for herself and for all others similarly situated, Plaintiffs, vs. JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona, Defendant.	NO. CIV-69-158-TUC. — MOTION TO STAY ENFORCEMENT AND EXECUTION OF JUDGMENT

Now comes the Defendant, by and through his attorneys, and moves this Court for an Order Staying the Enforcement and Execution of the Amended Judgment entered herein on the 26th day of June, 1970 pending appeal; or alternatively for an Order Staying the Enforcement and Execution of the Judgment as to the class pending appeal.

RESPECTFULLY submitted this 3rd day of July, 1970.

GARY K. NELSON
The Attorney General

MICHAEL S. FLAM
/s/ Michael S. Flam
Michael S. Flam, Special
Assistant Attorney General
1624 West Adams Street
Phoenix, Arizona 85007

MEMORANDUM OF POINTS AND AUTHORITIES

The propriety of the issuance of a stay is dependent on the circumstances of the particular case. The factors to be considered by the Court in the granting of a stay are as follows:

1. Whether appellant is likely to prevail on the merits of the appeal;
2. Whether, without such relief, Appellant will be irreparably injured;
3. Whether the issuance of the stay will substantially harm other parties interested in the proceedings;
4. The public interest involved.

36 C.J.S. Federal Courts 294(3).

In Federal law, a stay is granted, if substantial questions are presented and if denial of a stay may result in irreparable damage to the applicant. *Winters v. U.S.*, 89 S.Ct. 57, 21 L.Ed. 2d 80. Where question is whether an injunction should be granted, the irreparable injury facing the plaintiff must be balanced against the competing equities before an injunction will issue, and the same considerations obtain where the issue is whether an injunction should be lifted or stayed. *Breswick v. New York*, 75 S.Ct. 912.

In *King v. Smith*, 88 S.Ct. 841, 19 L.Ed. 2d 970, Justice Black was confronted with a situation similar to the present case. The Federal District Court held unconstitutional a regulation of the Alabama Department of Pensions and Security which made certain children ineligible for welfare assistance whenever their mother is cohabiting with a man other than her husband. 277 F.Supp. 31. The District Court's decree ordered immediate restoration to the welfare rolls of all children who had been disqualified solely because of the "substitute father" regulation. Justice Black granted a stay since the District Court decree would require the state to pay out substantial sums of money which could never be recovered in the event of reversal. Justice Black later vacated the stay because of a Congressional amendment changing the considerations involved in his previous decision that are not here relevant.

A stay is reasonably necessary to protect appellant from serious injury in case of a reversal. It does not appear that appellee will sustain disproportionate injury in case of affirmance. If the stay is not granted, the State may be compelled to pay out substantial sums of money with little likelihood of recovery in case of reversal. See affidavit of John Sustek hereto attached as Exhibit "A". In that affidavit, Mr. Sustek estimates that between 2,600 and 3,900 resident aliens are eligible for welfare assistance of which the annual cost is estimated to be between $726,700.00 to $1,090,000.00 in State funds and total State and Federal funds between $2,457,600.00 and $3,686,-400.00. The State will have to bear the added expense of processing claims and the expense of attempting to recover such claims in the event of reversal. If the stay is granted, in the event of ultimate affirmance, relief for plaintiff and the class they represent would only have been postponed.

When a Federal District Court has declared unconstitutional a state statute enacted pursuant to a Federal Law, that Court should accord sufficient deference to the State's law to grant a stay of judgment when an intention to appeal has been indicated.

The stay granted by Justice Black in *King v. Smith, supra* prevented recipients who were receiving ADC benefits from being *restored* to the welfare rolls pending Supreme Court determination. If a stay were granted in the instant case it would only prevent *potential* recipients, who had never qualified for welfare benefits, from receiving benefits, pending decision by the United States Supreme Court. There is a better reason for granting a stay of judgment here than in *King v. Smith, supra,* because plaintiff has not grown accustomed or dependent upon the monthly welfare stipend in the case at bar.

Defendant meets all the criteria mentioned herein for the Court to grant him an order staying enforcement and execution of the judgment. Courts should act with a view towards doing

substantial justice between the parties. Justice may be best served in light of the public interest involved by granting Defendant's Motion to Stay.

Copy mailed this 3rd
day of July, 1970 to:

Anthony B. Ching, Esq.
Chief Trial Counsel
Legal Aid Society
55 West Congress Street
Tucson, Arizona 85701
Attorney for Plaintiffs

EXHIBIT "A"

STATE OF ARIZONA }
COUNTY OF MARICOPA } ss

I, John Sustek, being first duly sworn upon oath, depose and say:

That I am the Director of Assistance Payments Division of the Arizona State Department of Public Welfare and previous to becoming the Director of Assistance Payments was, for six years, in charge of Research and Statistics for the Department of Public Welfare;

That I have a B.S. degree in Business Administration and a M.B.A. degree in Business Administration, of which twelve hours consisted of statistics;

That, based upon a letter directed to Mr. Michael S. Flam from the Department of Immigration and Naturalization, a copy of which is attached to this Affidavit, the following analysis regarding potential resident alien recipients is made.

CITIZENSHIP-RESIDENCE RULING

In making the attached estimates, 3 major assumptions about the 46,173 permanent aliens were made:

1) that the majority of the alien group was of Mexican origin,
2) that the group would exhibit the same general age characteristics as the total population,
3) that, being aliens, they were less likely to have extensive Social Security coverage and therefore that average grants would be a conservation basis.

Computation Basis:

A) Total population of Arizona 1.75 million, of which 8% or 140,000 are age 65 or over and 50% or 875,000 are between 21 and 64.

B) The OAA population in Arizona of 13,600 persons is 9.7% of all persons 65 and over.

C) The "all other" welfare population of 10,200 represents 11.7% of all persons under age 65.

Estimates:

A) OAA—9.7% of 46,173 (8%)=358 potential recipients because of the lower Social Security potential and the conservative nature of the average grant the final estimate was 400-600, potential recipients.

B) Other—11.7% of 46,173 (50%)=2,701 potential recipients because of the lower Social Security potential and the conservative nature of the average grant the final estimate was 2200-3300, potential recipients. (Note: I am not sure of the 50% estimate of the population age group 21-64; therefore, I dropped the low end of the final estimate.)

			ANNUAL BASIS	
Program	No.	Av. Grant	Total Cost	State Share
OAA	400	$72.00	$ 345,600.00	$ 91,500.00
"	600	"	518,400.00	137,200.00
Other	2,200	$80.00	2,112,000.00	635,200.00
"	3,300	"	3,168,000.00	952,800.00
TOTAL—Low			$2,457,600.00	$ 726,700.00
—High			3,686,400.00	1,090,000.00

Summary:

Only adult cases were considered since the ruling did not affect ADC cases.

JOHN SUSTEK
John Sustek, Director
Assistance Payments Division
Arizona State Department of Public Welfare

Subscribed and sworn to before me this 3rd day of July, 1970.

Norma R. Larson
Notary Public

My Commission expires:
June 25, 1972.

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
230 North First Avenue
Phoenix, Arizona 85025

June 8, 1970

Mr. Michael S. Flam, Special
Assistant Attorney General
Office of the Attorney General
State Capitol
Phoenix, Arizona 85007

Dear Mr. Flam:

Reference is made to your letter of June 5, 1970, requesting statistics regarding the alien population of Arizona.

The answers to your questions 1 and 2 are as follows:

1. Number of resident aliens living in the State of Arizona: 46,173 permanent resident aliens reported their address in Arizona in January 1970.

2. Number of temporary aliens in the State of Arizona: 3,130 temporary aliens reported during January 1970.

We do not break down the alien registration cards by age and, inasmuch as we have in excess of 50,000 aliens registered in the State, to attempt to do so would require several weeks. We do not have the personnel to accomplish this task.

Please do not hesitate to advise if we can furnish any additional information which will be of use to you in presenting your case.

Sincerely,

/s/ ROBERT L. JARRATT
ROBERT L. JARRATT
DISTRICT DIRECTOR

AFFIDAVIT

STATE OF ARIZONA)
COUNTY OF MARICOPA) ss

Michael S. Flam, being first duly sworn, deposes:

That he served the attorney for the Plaintiffs in the foregoing case by forward an exact copy of Defendant's Motion to Stay Enforcement and Execution of Judgment in a sealed envelope, first-class postage prepaid, and deposited same in the United States mail addressed to:

Mr. Anthony B. Ching
Chief Trial Counsel
Legal Aid Society
55 West Congress Street
Tucson, Arizona 85701

this 3rd day of July, 1970.

/s/ Michael S. Flam

Michael S. Flam

Subscribed and sworn to before me this 3rd day of July, 1970.

/s/Norma R. Larson
Notary Public

My Commission expires:
June 25, 1972

LEGAL AID SOCIETY
Anthony B. Ching
55 West Congress Street
Tucson, Arizona 85701
623-6260
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, for herself and for all others similarly situated, Plaintiffs, vs. JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona, Defendant.	NO. CIV-69-158-TUC. — OPPOSITION TO MOTION TO STAY ENFORCEMENT AND EXECUTION OF JUDGMENT

Plaintiffs oppose defendant's Motion to Stay Enforcement and Execution of Judgment, the amended judgment, for the reason that this case represents the kind of case where a stay should not be granted.

Dated this 9th day of July, 1970.

LEGAL AID SOCIETY OF THE PIMA COUNTY BAR ASSOCIATION
By: /s/ Anthony B. Ching
Anthony B. Ching
Chief Trial Counsel
55 West Congress Street
Tucson, Arizona 85701
Attorneys for Plaintiffs

Copy of the foregoing
mailed this 9th day
of July, 1970, to:

Michael S. Flam, Special Assistant
Attorney General
1624 West Adams Street
Phoenix, Arizona 85007

LEGAL AID SOCIETY
Anthony B. Ching
55 West Congress Street
Tucson, Arizona 85701
623-6260
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, for herself and for all others similarly situated, Plaintiffs, vs. JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona, Defendant.	NO. CIV-69-158 TUC. — MEMORANDUM OF POINTS AND AUTHORITIES

I. *The Standards for the Granting of a Stay Pending Appeal*

The standards for the granting of a stay pending appeal have been succinctly set forth in four questions in *Virginia Petroleum Jobbers Assoc. V.F.P.C.,* 259 F. 2d 921, 925 (D.C. Cir. 1958), cited favorably in

In re Permian Basin Area Rate Cases, 390 U.S. 773 (1968):

(1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal?
(2) Has the petitioner shown that without such relief it will be irreparably injured?
(3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . . Relief saving one claimant from irreparable injury, at the expense of similar harm caused another might not qualify as the equitable judgment that a stay represents.
(4) Where lies the public interest?

A fifth consideration is that where constitutional rights are involved, judgments regarding stays are to be made in favor of the party that stands to lose vital, tangible benefits protected by those rights. This is particularly true when the order sought to be stayed is based upon an opinion in which the trial court fully considered the constitutional issues and balanced the interests of each party when granting relief. See, e.g., *Kale v. Egan*, 80 Sup. Ct. 33 (1959); *Board of Education v. Taylor*, 82 Sup. Ct. 10 (1961).

II. *Application of the Standards to this Case*

A. "Has the Petitioner made a strong showing that it is likely to prevail on the merits of its appeal?"

Defendant's motion and supporting affidavit makes no showing at all that it is likely to succeed upon the merits. Indeed, the subject has not even been considered. Defendant's affidavit merely purports to estimate the cost of providing welfare benefits to those who are unconstitutionally denied these benefits. The only "reason" put forth for by the defendant is the unsupported speculation that if the Supreme Court reversed this case the state would suffer the loss of money.

The total omission from defendant's papers of discussion on the merits is not accidental. The unanimous opinion of this court clearly showed that neither precedent nor logic supported defendant's position. Every possible argument proposed in favor of the statute in question was considered and found wanting.

No showing of irreparable injury to the defendant has been made. At most, the supporting affidavit claims only that effectuation of the order will involve "a substantial expenditure of funds." For that reason, and that reason alone, the affidavit concludes that the case involves questions of "great importance to the State, and will have a great impact on the State's administration of its welfare programs." However, such an expenditure does not qualify defendant for a stay.

> The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.

Virginia Petroleum Jobbers Assoc. V.F.P.C., supra, 259, F. 2d at 925.

The administrative impact of the order will be minor. While some time will be required to service new clients, that time will be much less than the time saved already by denying the clients' original applications for assistance. In *Kelly v. Wyman*, 294 F. Supp. 893 (S.D.N.Y. 1968), the order required implementation of a new system of person review hearings prior to termination of assistance, with counsel, confrontation of witnesses and disclosure of evidence. Yet both the three-judge district court and Mr. Justice Harlan, on January 10, 1969, refused to stay the order pending appeal.

> B. "Would the issuance of a stay substantially harm the other parties interested in the proceedings?

The plaintiffs in this case will suffer substantial irreparable injury if a stay is granted. If they are eligible for welfare they have no source of income. If these grants are not forthcoming, they are left totally dependent upon the charity of relatives and friends, most of whom are probably also indigent. Each individual in the class of plaintiffs will be unable properly to feed and clothe themselves.

It is equally important that the judgment be implemented at this time. An appeal to the Supreme Court, if it should be heard, might well take six months to over a year to be decided. These cases involve people who are now without any support. In equity, the burden on the State will be comparatively small but the burden on the individual class members will be incalculable.

Finally, it should be noted that in other residency cases, Supreme Court justices have refused to stay orders pending appeal because of the enormous and irreparable harm to the recipients.

See e.g., *Green v. Department of Public Welfare,* Sept. 1, 1967 (J. Black); *Harrell v. Tobriner,* Dec. 29, 1967 (J. Brennan); *Smith v. Reynolds,* Jan. 4, 1968 (J. Brennan); *Burns v. Montgomery,* May 10, 1968 (J. Douglas). In each of these instances, of course, the three-judge district courts had previously refused a stay.

Conclusion

For the reasons stated above, it is respectfully requested that the defendant's motion for a stay be denied.

Dated: This ..... day of July, 1970.

Respectfully submitted,

LEGAL AID SOCIETY OF THE PIMA COUNTY BAR ASSOCIATION

BY: ANTHONY B. CHING
Anthony B. Ching
Chief Trial Counsel
55 West Congress Street
Tucson, Arizona 85701
Attorneys for Plaintiffs

Copy of the foregoing
mailed this ..... day
of July, 1970, to:

Michael S. Flam, Special Assistant
Attorney General
1624 West Adams Street
Phoenix, Arizona 85007

MICHAEL S. FLAM, Special
Assistant Attorney General
1624 West Adams Street
Phoenix, Arizona 85007

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, for herself and for all others similarly situated, Plaintiffs, v. JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona, Defendant.	NO. CIV-69-158 TUC. — REPLY TO OPPOSITION TO MOTION TO STAY ENFORCEMENT AND EXECUTION OF JUDGMENT

It is not the purpose of an application for stay to reargue the merits of the case. However, the event of a reversal by the Supreme Court is not mere speculation. It is clear aliens do not occupy the same position as citizens. See *McCreaty v. Va.*, 94 U.S. 391; *Patsone v. Penn.*, 232 U.S. 138; *Terrace v. Thompson*, 263 U.S. 197 (1923); *Harisiades v. Shaugnessy*, 342 U.S. 580 (1952).

Arizona's alien eligibility requirements have not been promulgated at the mere whim of the state legislature. They have been subject to constant federal scrutiny. These requirements are worthy of at least one appellate review and a stay of orders pending that review.

The District Court opinion relies heavily on *Shapiro v. Thompson*, 394 U.S. 618 (1969), citing the constitutional right to travel.

It is interesting to note that all cases referring to the right to travel make specific reference to citizens. *Passenger Cases,* 7 How. 283; *Kent v. Dulles,* 357 U.S. 116, 125 (1958). Courts have also based the right to travel on the privileges and immunities clause Art. IV § 2 of the Constitution, see *Corfield v. Corgell,* 6 Fed. Cases 546, 552; *Paul v. Virginia,* 8 Wall 168, 180 (1869); *Ward v. Maryland,* 12 Wall 418 (1871). The privilege and immunities clause, however, explicity refers to citizens.

Plaintiff cites no cases on point for the proposition that a stay should not issue in this case. *Board of Education v. Taylor,* 82 Sup. Ct. 10 (1961) cited by Plaintiff was a school desegration case. The issues were far different than the case at bar. Indeed, language in that case support Defendant's position:

> "We see no occasion to grant a stay of the decree, the board is called upon for no public expenditures and will suffer no loss, while the school children will be prejudiced by what will soon be necessarily a years delay at this crucial period in their education."

As stated in the Defendant's Motion for Stay, the state will be called upon for vast expenditures with little chance of recovery in the event of reversal.

Kelly v. Wyman, 294 F.Supp. 893 (S.D.N.Y. 1968) relied on by Plaintiff is also inapposite. In that case the court stated:

> "Clearly the state must see to it that assistance goes only to those that are entitled to it. However the issue here affects only the *continuation* of benefits, while a claim of ineligibility is disputed." (emphasis ours)

At the end of that opinion the court intimated a stay would be granted in the event of appeal.

> ". . . if defendants desire a stay pending appellate review their proposed order should so provide."

In refusing to grant a stay in *Virginia Petroleum Job Ass'n. v. Federal Power Comm.,* 259 F.2d 921, the court stated:

> "We note that congress has charged the commission with administering the Natural Gas Act in the public interest . . . .

> We must hesitate before we say what the commission may find necessary and convenient, and we must be and are reluctant to interfere with administrative proceedings."

In the instant case the court has struck down important statutes affecting certain administrative regulations pertaining to eligibility for public assistance. If the court has the required reluctance to interfere with state administrative proceeding the least that can be expected is a stay pending ultimate review.

Kake v. Egan, 80 Sup.Ct. 10 (1961) is clearly distinguishable on its facts. It may be helpful to the court for the proposition that when a state enacts a statute which is contrary to a federal regulation and the Federal District Court sustains that statute, a stay will issue pending appellate review. In the present case a state statute was enacted *pursuant* to a Federal regulation. Similarly, a stay should issue pending review.

Different considerations prevail when welfare recipients are about to be terminated. *Kelly v. Wyman, supra.* However, in this case Plaintiff is seeking to receive welfare for the first time. There are similar cases pending in other jurisdictions. *Leger v. Saler,* No. 69-286? (D.C.-Penn.); *Gonzales v. Shea,* No. C-1920 (D. C.-Colo.); *Nikolits v. Bax,* (D.C.-S.D.Fla.) No.....

In view of the possibility of conflict in the different circuits on the precise question presented a stay should be granted pending a decision by the United States Supreme Court laying the issue to rest.

Statutes providing for appeals directly to the U. S. Supreme Court are intended by Congress as a procedural protection against an improvident statewide doom by a Federal court of a state's legislative policy. This Court should provide the necessary procedural protection by granting a stay pending appellate review by the U.S. Supreme Court.

RESPECTFULLY submitted this 17th day of July, 1970.

GARY K. NELSON
The Attorney General

/s/ Michael S. Flam
Michael S. Flam, Special
Assistant Attorney General
1624 West Adams Street
Phoenix, Arizona 85007

STATE OF ARIZONA)
) ss
COUNTY OF MARICOPA)

Michael S. Flam, being first duly sworn, deposes:

That he served the attorney for the Plaintiff in the foregoing case by forwarding an exact copy of Defendant's Reply to Opposition to Motion to Stay Enforcement and Execution of Judgment in a sealed envelope, first-class postage prepaid, and deposited same in the United States mail addressed to:

Mr. Anthony B. Ching
Chief Trial Counsel
Legal Aid Society
55 West Congress Street
Tucson, Arizona 85701

this 17th day of July, 1970.

/s/ Michael S. Flam
Michael S. Flam

SUBSCRIBED and sworn to before me this 17th day of July, 1970.

/s/ Norma R. Larson
Notary Public

My Commission expires:
June 25, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, for herself and for all others similarly situated, Plaintiff, vs. JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona, Defendant.	NO. CIV-69-158-TUC. — AMENDED ORDER STAYING ENFORCEMENT AND EXECUTION OF JUDGMENT

On motion of defendant, and the Court having considered the motion and the opposition thereto, and good cause appearing therefor,

IT IS ORDERED that enforcement and execution of the Amended Judgment entered herein on June 26, 1970, is stayed as to all parties plaintiff other than Carmen Richardson pending appeal of said Amended Judgment to the Supreme Court of the United States.

DATED: July 30, 1970.

GILBERT H. JERTBERG
United States Circuit Judge

JAMES A. WALSH
United States District Judge

C. A. MUECKE
United States District Judge

Supreme Court of the United States

No. **609** ----- , *October Term, 19* **70**

John O. Graham, Commissioner, Department of Public Welfare, State of Arizona,

Appellant,

v.

Carmen Richardson, etc.

APPEAL from the United States District Court for the District of Arizona.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

December 14, 1970

Supreme Court of the United States

No. 649

JOHN O. GRAHAM, Commissioner,
Department of Public Welfare,
State of Arizona,

Appellant,

versus

CARMEN RICHARDSON, for herself
and for all others similarly
situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ARIZONA

JURISDICTIONAL STATEMENT

GARY K. NELSON
Attorney General
State of Arizona
159 Capitol Building
Phoenix, Arizona 85007
By MICHAEL S. FLAM
Special Assistant
Attorney General
1624 West Adams Street
Phoenix, Arizona 85007
Attorneys for Appellant

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TABLE OF AUTHORITIES CITED

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TABLE OF AUTHORITIES CITED (Continued)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No._____

JOHN O. GRAHAM, Commissioner,
Department of Public Welfare,
State of Arizona,

Appellant,

versus

CARMEN RICHARDSON, for herself
and for all others similarly
situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

OPINION BELOW

The opinion of the three judge District Court has not yet been officially reported. A copy of that opinion and order is set forth in Appendix A.

JURISDICTION

This is an appeal from the amended judgment of a three judge District Court declaring Arizona's U. S. citizenship as well as the fifteen (15) year durational residency requirements provided by A.R.S. §§ 46-233(A)(1), 46-252(2), 46-272(4), as amended, unconstitutional and permanently enjoining appellant from enforcing those provisions. The court originally entered an opinion and order on May 27, 1970. Following a stipulation between the parties, the court withdrew its first judgment and issued and entered an amended judgment dated June 26, 1970. The notice of appeal was filed on July 9, 1970 in the U. S. District Court, District of Arizona. See Appendix B. On July 20, 1970, the U. S. District Court ordered the amended judgment stayed pending review by this Court.

This appeal is taken from the amended judgment of June 26, 1970 which is set forth in Appendix C.

This Court has jurisdiction by virtue of 28 U.S.C. § 1253.

STATUTORY PROVISIONS INVOLVED

"A.R.S. § 46-233. *Eligibility for general assistance*

"A. No person shall be entitled to general assistance who does not meet and maintain the following requirements:

"1. Is a citizen of the United States, or has resided in the United States a total of fifteen years."

"A.R.S. § 46-272. *Eligibility for blind assistance*

"Assistance shall be granted to any person who meets and maintains the following requirements:

"4. Is a citizen of the United States, or has resided in the United States a total of fifteen years."

"A.R.S. § 46-252. *Eligibility for old age assistance*

"Assistance shall be granted under this article to any person who meets and maintains the following requirements:

"2. Is a citizen of the United States, or has resided in the United States a total of fifteen years."

QUESTIONS PRESENTED

42 U.S.C. § 1352(b)(2), Aid to the Permanently and Totally Disabled, gives the Secretary (of Health, Education and Welfare) authority to approve any welfare plan which fulfills conditions specified in subsection (a) of that act, except he shall not approve any plan imposing any citizenship requirement which excludes any citizen of the United States. There are similar provisions for Old Age Assistance, 42 U.S.C. § 302(b)(3); Aid to the Blind, 42 U.S.C. § 1202(b)(2); Aid to the Aged, Blind or Disabled, 42 U.S.C. § 1382(b)(2). Pursuant to 42 U.S.C. § 1302 the Secretary has published a Handbook of Public Assistance Administration which part IV §§ 3720 and 3730 read as follows:

> "A state plan under titles I, X, XIV and XVI may not impose, as a condition of eligibility, any citizenship requirement which excludes any citizen of the United States . . . .
>
> "Where there is an eligiblity requirement applicable to non-citizens, state laws may, as an alternative to excluding all non-citizens, provide for qualifving non-citizens, otherwise eligible, who have resided in the United States for a specified number of years."

The questions presented are:

1. Whether, in its application to these appellees, Arizona Revised Statutes §§ 46-233.A.1., 46-252.2., 46-272.4. enacted pursuant to Federal Law are violative of the United States Constitution in that they constitute:

A. An undue burden on appellees' right to travel;

B. An infringement of the equal protection clause contained in the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Carmen Richardson, the named plaintiff, is a lawfully admitted alien. She has been a continuous resident of the State of Arizona for thirteen years. Mrs. Richarson was sixty-four years and nine months of age at the time of the filing of the complaint. Prior to the District Court decision she was eligible for benefits under

the Aid to the Permanently and Totally Disabled (APTD) or Old Age Assistance (OAA) but for the U.S. citizenship requirement or, in lieu of U.S. citizenship, the fifteen year residency requirement for aliens provided by Arizona law.

Plaintiff brought this as a class action attacking the constitutionality of these provisions of Arizona welfare laws: (1) General assistance, (2) Assistance for the blind, and (3) Old age assistance (*supra*). The claimed infirmity in all the Arizona statutes mentioned *supra* is the U. S. citizenship requirement or, in lieu of U. S. citizenship, the fifteen year residency requirement for aliens violates the constitutional right to travel, *Shapiro v. Thompson,* 394 U.S. 618 (1969), and the equal protection clause of the Fourteenth Amendment to the U. S. Constitution.

Both parties moved for summary judgment before a three judge District Court convened pursuant to 28 U.S.C. §§ 2281 and 2284. Jurisdiction was conferred upon the Court by 28 U.S.C. §§ 1343, 2201, 2202 and 42 U.S.C. § 1983.

On May 27, 1970 the court filed an opinion granting plaintiffs' motion and relying on *Shapiro v. Thompson, supra, Dandridge v. Williams,* 397 U. S. 471 (1970) *and Takahashi v. Fish and Game Commission,* 334 U.S. 410 (1948) held that Arizona Revised Statutes §§ 46-233.A.1., 46-252.2. and 46-272.4. violate the equal protection clause of the Fourteenth Amendment and constituted an impermissible burden on plaintiffs' constitutional right to travel.

THE QUESTIONS ARE SUBSTANTIAL AND JURISDICTION SHOULD BE NOTED

Any time any aspect of an important state statute is declared unconstitutional by a Federal court, the issue can hardly be said to be anything but substantial. Similarly, whenever a three judge Federal District Court enjoins the enforcement of an important state statute and the only appeal from that order is to this Court, the issue is substantial. The issue in this case is far too important

for the holding of the District Court to be both the first and last word on the matter. A question of this stature deserves at least one appellate review.

Statutes providing for appeals directly to this Court are intended by Congress as a procedural protection against "an improvident state-wide doom by a federal court of a state's legislative policy" whether "such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an 'administrative board or commission.'" *Phillips v. United States,* 312 U.S. 246, 251 (1941). The precise situation calling for that procedural protection is presented. This Court can provide the necessary protection by noting jurisdiction.

It is well settled that one of the most important factors to be taken into consideration in determining the substantiality of federal questions presented to this Court on appeal is a conflict among the lower courts on the precise question presented. The predicament of the State of Arizona is representative. Arizona is not unique in restricting welfare payments. See Appendix D. There are similar cases pending in other jurisdictions. *Leger v. Saler,* No. 69-2869 (D.C.E.D.-Penn.); *Gonzales v. Shea,* No. C-1920 (D.C.-Colo.); *Nikolits v. Bax,* (D.C.S.D.-Fla.) No. ..... An answer is needed from this Court to lay the issue to rest.

The District Court's decision will have far reaching effects. Aliens are not citizens. The thin line between citizenship rights and alien rights is not clear. It is well settled that aliens have never had the same rights and privileges as citizens. To mention only a few, aliens cannot vote, A.R.S. § 16-101.A.(1); hold certain employment, Arizona Constitution, Art. XVIII, § 10; or serve on a jury, A.R.S. § 21-201. It is clear aliens do not occupy the same position as citizens. See *McCreaty v. Va.,* 94 U.S. 391 (1876); *Patsone v. Penn.,* 232 U.S. 138 (1914); *Terrace v. Thompson,* 263 U.S. 197 (1923); *Harisiades v. Shaughnessy,* 342 U.S. 580 (1952). In *Truax v. Raich,* 239 U.S. 33 (1915) this Court struck down portions of Arizona's employment laws

which favored citizens over aliens. However, the Court limited its holding considerably by the following language:

> "The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other states."

It is submitted that Arizona's welfare laws fit into the exception promulgated by this Court in *Truax, supra.*

The court's opinion below is completely devoid of any reasoning or guidelines which the appellant might use as the basis for determining how he might properly, if at all, go about establishing reasonable requirements for aliens.

Congress has entrusted exclusive responsibility for surveillance of state welfare plans to the Secretary of Health, Education, and Welfare. *Rosado v. Wyman,* 397 U.S. 397 (1970) dissenting opinion. The Secretary has approved Arizona's plan as complying with Federal Law. See letter of Robert Finch, former Secretary of Health, Education, and Welfare, Appendix E.

Arizona's alien eligibility requirements have not been promulgated at the mere whim of the state legislature. They have been subject to constant federal scrutiny. These requirements are worthy of at least one appellate review. If this Court refuses to hear this appeal, then the issue of alien eligibility requirements will remain clouded. As a consequence, Arizona will be deprived of ever having an appellate court rule on the matter in this case.

Relying heavily on the authority of *Shapiro v. Thompson, supra,* the District Court struck down Arizona's eligibility requirements for aliens holding the regulations violated the constitutional right to travel. The language of this court in *Shapiro v. Thompson, supra* indicates such a result was unwarranted.

> "This court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all *citizens* be free to travel throughout the

length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this right." (emphasis ours)

It is interesting to note that all cases referring to the right to travel make specific reference to citizens. *Passenger Cases,* 7 How. 283 (1849); *Kent v. Dulles,* 357 U.S. 116, 125 (1958). The court has also based the right to travel on the privileges and immunities clause of Art. IV, § 2 of the Constitution, see *Corfield v. Coryell,* 6 Fed. Cases 546, 552 (1823); *Paul v. Virginia,* 8 Wall 168, 180 (1869); *Ward v. Maryland,* 12 Wall 418 (1871). The privileges and immunities clause, however, explicitly refers to citizens. In *Edwards v. California,* 314 U.S. 160 at 181 (1941) Justice Douglas said:

"The right to move freely from state to state is an incident of *national* citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference." (emphasis ours)

Even if this Court should find that aliens have the constitutional right to travel, it is difficult to see how Arizona's *national* residency requirement infringes on that right.

Arizona's welfare laws have been criticized as being socially unjust and uneconomical. These criticisms, valid or invalid, are not the concern of the federal judiciary.

"Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court." *Dandridge v. Williams, supra.*

CONCLUSION

The lower court's decision is unclear. It holds Arizona's eligibility requirements for aliens are violative of the equal protection clause and the constitutional right to travel but it is unclear whether Arizona must provide any welfare benefits for aliens. If a limitation is to be recognized — as Arizona feels it should —

the dividing line must be drawn. It would be an anomalous situation if Arizona could exclude aliens from welfare programs altogether but, in the alternative, could not provide a time limitation for eligibility.

In view of the importance of the question concerning the way the Arizona Welfare Department administers the Social Security Act, the economic significance of the problem, and the likelihood of a conflict developing between the circuits, it is urged that jurisdiction be noted.

Whether the ruling is in favor of the appellant or the appellees is not nearly so important as the fact of the ruling itself. If jurisdiction is not noted, Arizona will be deprived of appellate review.

It is respectfully prayed this Court review the amended judgment of the District Court.

Respectfully submitted.

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By MICHAEL S. FLAM
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Phoenix, Arizona 85007

Attorneys for Appellant.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, for herself and for all others similarly situated, Plaintiff, vs JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona, Defendant,	No. CIV 69-158 Tuc. Opinion and Order

MUECKE, D. J.

The undisputed facts are:

The named plaintiff, Carmen Richardson, is an alien lawfully admitted to the United States under the laws of this country. She has been continuously a resident of the State of Arizona for thirteen years. Mrs. Richardson was sixty-four years and nine months of age at the time of the filing of the complaint. She fulfilled the age requirement for Old Age Assistance (OAA) in October of 1969. Presently, she is permanently and totally disabled and would be eligible for assistance under the Aid to the Permanently and Totally Disabled (APTD) program but for the fifteen-year residency requirement of Arizona law. By reason of this law, she is ineligible to receive APTD assistance and suffers irreparable injury, as presently she has no income whatsoever and exists on charity on the part of neighbors and friends.

Plaintiff, in this class action, attacks the constitutionality of

three provisions of Arizona welfare law: (1) General assistance;[1] (2) Assistance for the blind;[2] and (3) Old age assistance.[3]

The Court has jurisdiction of this action by virtue of 42 U.S.C. § 1983 (Civil Rights Act of 1871), 28 U.S.C. § 1343 (Civil Rights), 28 U.S.C. §§ 2201 and 2202 Declaratory Judgments Act), and 28 U.S.C. §§ 2281 and 2284 (Three Judge Courts).

The claimed infirmity in all the Arizona statutes is that a fifteen-year residency requirement for resident aliens violates the constitutional right to travel, *Shapiro v. Thompson,* 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed. 2d 600 (1969); the Social Security Act; and, even though Congress may have empowered the states to act in this area, the equal protection clause of the Fourteenth Amendment. It is also argued that the field of regulating aliens has been preempted by the federal government.

42 U.S.C. § 1352(b)(2) provides that "(t)he Secretary (of Health, Education and Welfare) shall approve any welfare plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes as a condition of eligibility for aid to the permanently and totally disabled under the plan . . . (a)ny citizenship requirement which excludes any citizen of the United States."

There are similar provisions for Old Age Assistance, 42 U.S.C.

---

[1] A.R.S. § 46-233. *Eligibility for general assistance*

A. No person shall be entitled to general assistance who does not meet and maintain the following requirement:

1. Is a citizen of the United States, or has resided in the United States a total of fifteen years.

[2] A.R.S. § 46-272. *Eligibility for blind assistance*

Assistance shall be granted to any person who meets and maintains the following requirement:

4. Is a citizen of the United States, or has resided in the United States a total of fifteen years.

[3] A.R.S. § 46-252. *Eligibility for old age assistance*

Assistance shall be granted under this article to any person who meets and maintains the following requirement:

2. Is a citizen of the United States, or has resided in the United States a total of fifteen years.

§ 302(b)(3); Aid to the Blind, 42 U.S.C. § 1202(b)(2); Aid to the Aged, Blind or Disabled, 42 U.S.C. § 1382(b)(2).

In the same title of the United States Code, § 1302, Congress authorized the Secretary of Health, Education and Welfare to make such rules as may be necessary to the administration of the Welfare Act. Pursuant to this authority, the Secretary has published a Handbook of Public Assistance Administration.[4] Sections 3720 and 3730, Part IV of this Handbook read respectively as follows:

> "A state plan under titles I, X, XIV (aid to permanently and totally disabled) and XVI may not impose, as a condition of eligibility, any citizenship requirement which excludes any citizen of the United States.
>
> "Where there is an eligibility requirement applicable to noncitizens, State laws may, as an alternative to excluding all noncitizens, provide for qualifying noncitizens, otherwise eligible, who have resided in the United States for a specified number of years."

Relying on the statutes and the regulations cited, the State herein argues that Congress by itself and through the Department of Health, Education and Welfare has authorized the States to require citizenship as a basis for eligibility for welfare benefits. In other words, the State takes the position that either no welfare benefits need be given resident aliens or else a residency requirement may be imposed as is the case here.

Buttressing this view, according to the State, is the United States Supreme Court decision in *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915), wherein it is stated:

> "... The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other states. ..." *Truax v. Raich*, 239 U.S. at 39, 36 S.Ct. at 10, 60 L.Ed. at"

[4] See § 201.3(d), Title 45, Code of Federal Regulations.

Responding to such argument by the State, we hold that nothing in the explicit language of 42 U.S.C. § 1352(b)(2) and the related statutes authorizes any residency requirement such as is at issue here to be imposed by the states upon aliens. Insofar as the language of 42 U.S.C. § 1352(b)(2), 42 U.S.C. § 302.(b)(3), 42 U.S.C. § 1202(2), and 42 U.S.C. § 1382(b)(2) is construed to mean that the State is empowered to impose a fifteen-year residency requirement before an alien lawfully resident in the United States can receive aid, we further hold that such a construction is violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The quoted paragraph from *Truax v. Raich, supra,* is dicta not necessary to the decision in that case, and the language is too general to serve as authority to support the residency restriction here imposed. In any event, later decisions of the United States Supreme Court make clear the course to be followed in this case.

In *Shapiro v. Thompson, supra,* the Supreme Court discussed the equivalent provisions for Aid to Families with Dependent Children (§ 402(b) which dealt with a one-year residency requirement.

> On its face, the statute does not approve, much less prescribe, a one-year requirement. It merely directs the Secretary of Health, Education, and Welfare not to disapprove plans submitted by the States because they include such a requirement.... But even if we were to assume, *arguendo,* that Congress did approve the imposition of a one-year waiting period, it is the responsive *state* legislation which infringes constitutional rights. By itself § 402(b) has absolutely no restrictive effect. It is therefore not that statute but only the state requirements which pose the constitutional question.
>
> Finally, even if it could be argued that the constitutionality of § 402(b) is somehow at issue here, it follows from what we have said that the provision, insofar as it permits the one-year waiting period requirement, would be unconstitutional. Congress may not authorize the States to violate the Equal Protec-

tion Clause. *Shapiro v. Thompson, supra,* 394 U.S. at 639, 89 S.Ct. a 1334, 22 L.Ed at ..... (emphasis in original).

No compelling state interest is argued which would mitigate in favor of a different result. Petitioner pays taxes into the coffers of the State. The "privilege" v. "right" argument does not answer the constitutional challenge. *Thompson, supra* n.6, 394 U.S. at 627, 89 S.Ct. at 1327, 22 L.Ed.2d at ..... The "purpose of inhibiting migration by needy persons into the State is constitutionally impermissible." *Thompson, supra,* 394 U.S. at 629, 89 S.Ct. at 1329, 22 L.Ed.2d at ..... Although the "State has a valid interest in preserving the fiscal integrity of its programs . . . it may not accomplish such a purpose by invidious distinctions. . . ." *Thompson, supra,* 394 U.S. at 633, 89 S.Ct. at 1330, 22 L.Ed.2d at ..... *See also Dandridge v. Williams,* .....U.S....., 90 S.Ct. ....., ...L.Ed.2d ....., slip opinion at 13 (No. 131, April 6, 1970).

In light of *Takahashi v. Fish and Game Commission,* 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478 (1948) and *Shapiro v. Thompson, supra,* it necessarily follows that the Arizona statutes previously cited,[5] imposing a fifteen-year residency requirement, are violative of the equal protection clause of the Fourteenth Amendment.

Accordingly, plaintiff's motion for summary judgment praying for a preliminary injunction and declaratory relief is granted.

---

[5] A.R.S. 46-233, 46-272, and 46-252.

DATE this 27 day of May, 1970.

(signed) _____
Gilbert H. Jertberg,
Circuit Judge

(signed) _____
James A. Walsh,
District Judge

(signed) _____
C. A. Muecke,
District Judge

APPENDIX B

ANTHONY B. CHING
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Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, for herself and for all others similarly situated, Plaintiffs, v. JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona, Defendant.	No. CIV 69-158 TUC. NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I

NOTICE IS HEREBY GIVEN that JOHN O. GRAHAM, Commissioner of the Department of Public Welfare, State of

Arizona, the Defendant above named, hereby appeals to the Supreme Court of the United States from the amended judgment of this Court in favor of the Plaintiffs and against the Defendant, dated and entered June 26, 1970.

This appeal is taken pursuant to 28 U.S.C. § 1253.

II

The Clerk will please prepare a transcript of the entire record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the reporter's transcript of the oral argument.

FILED this 8th day of July, 1970.

GARY K. NELSON
The Attorney General

(signed)_____
MICHAEL S. FLAM,
Special Assistant
Attorney General
1624 West Adams Street
Phoenix, Arizona 85007

PROOF OF SERVICE

I, GARY K. NELSON, the Attorney General of the State of Arizona, attorney for John O. Graham, Commissioner of the Department of Public Welfare, State of Arizona, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of July, 1970, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the Appellee, CARMEN RICHARDSON, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to their attorney of record as follows:

Anthony B. Ching
Chief Trial Counsel
Legal Aid Society of Pima County
55 West Congress Street
Tucson, Arizona 85701

(signed) _____
GARY K. NELSON
The Attorney General

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

CARMEN RICHARDSON, for herself and for all others similarly situated, Plaintiffs, vs. JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona, Defendant.	No. CIV 69-158 Tuc. AMENDED JUDGMENT

This action came on for hearing on Plaintiffs' motion for summary judgment and defendant's cross-motion for summary judgment before the Court, Honorable Gilbert H. Jertberg, Circuit Judge; Honorable C. A. Muecke, District Judge; and Honorable James A. Walsh, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered on May 27, 1970,

IT IS ORDERED AND ADJUDGED as follows:

(1) That pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, the action is to be maintained as a class action, all in accordance with Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure.

(2) That the class of plaintiffs is described as follows:

Those persons residing in the State of Arizona, who are not United States citizens, but who are lawfully admitted to the United States as permanent residents by the Federal government,

who are otherwise eligible for old age assistance, general assistance, blind assistance and aid to the permanently and totally disabled public welfare programs under the laws of Arizona, but are precluded from obtaining these benefits solely because of their being non-citizens and the lack of a total of fifteen years residency in the United States.

(3) That judgment be rendered in favor of the plaintiffs and against the defendant.

(4) That as to the plaintiffs, the United States citizenship requirement, as well as the fifteen-year durational residency requirement in the United States, as provided for in Arizona Revised Statutes §§ 46-233(A)(1), 46-252(2) and 46-272(4), as amended, are declared unconstitutional as violative of the due process clause and the equal protection clause of the Fourteenth Amendment to the United States Constitution.

(5) That defendant and his successors, agents and employees are hereby permanently enjoined from enforcing the United States citizenship requirement, as well as the fifteen-year durational residency requirement, as to the plaintiffs.

DATED this 26th day of June, 1970.

(signed) _____
Gilbert H. Jertberg,
Circuit Judge

(signed) _____
James A. Walsh,
District Judge

(signed) _____
C. A. Muecke,
District Judge

APPROVED AS TO FORM:

GARY K. NELSON
The Attorney General

By: (signed) 6/16/70

Michael S. Flam
Special Assistant Attorney General
Attorney for Defendant

APPENDIX D

CITIZENSHIP AS AN ELIGIBILITY FACTOR IN FEDERAL-STATE PUBLIC ASSISTANCE PROGRAMS

Based on *Characteristics of State Public Assistance Plans,*
with revisions as reported June 30, 1968*
(no further changes reported 11/20/69)

"Must be a citizen of the United States . . ." except as specified: Unduplicated Total 8 States

Old-Age Assistance (8 States)	Aid to the Blind (5 States
Arizona[1]	Arizona[1]
Colorado	. . . . .
Florida[2]	Florida[2]
Indiana	Indiana
New Hampshire[3]	. . . . .
North Dakota[4]	North Dakota[4]
South Carolina	. . . . .
Texas[5]	Texas

[1] — or resident of the United States for a total of 15 years

[2] — or resident of United States for at least 20 years

[3] — "(a woman who lost citizenship by marriage between March 2, 1907, and September 22, 1922, is construed to be a citizen); or an alien who has resided continuously in United States for 10 years with 1 year immediately preceding application in New Hampshire." (7/1/67)

[4] — or has resided 10 years in the United States

[5] — or has resided within the boundaries of the United States for 25 years

Aid to the Permanently and Totally Disabled (5 States)	Aid to Families with Dependant Children (1 State)
Arizona[1]	. . . . .
. . . . .	. . . . .
Florida[2]	. . . . .
. . . . .	. . . . .
New Hampshire	. . . . .
North Dakota[4]	. . . . .
. . . . .	. . . . .
Texas	Texas[6]

[6] — citizenship not required of parent of caretaker, though children must be citizens. (12-31-67).

• Source of Information:
DEPT. HEALTH, EDUCATION, WELFARE
Social and Rehabilitation Service
Assistance Payments Administration

Citations to State Laws as Basis for Citizenship Requirement as an Eligibility Factor — 8 States (To accompany Table "Citizenship as an Eligibility Factor in Federal-State Public Assistance Plans).

State	Citation and Categorical Program
Arizona	Arizona Revised Statutes: Title 46, OAA — 252; AB — 272; APTD —233
Colorado	Colorado Revised Statutes — 1963: 101-1-4
Florida	Florida Statutes Annotated: Section 409, OAA — 409.12. AB — 409.17; APTD — 409.40
Indiana	Burns Indiana Statutes: OAA — 52-1201; AB — 52-1221
New Hampshire	New Hampshire Revised Statutes Annotated, Volume 2, 167: 6 OAA and APTD
South Carolina	Code of Laws of South Carolina: OAA — Sec. 71-81
Texas	Vernon's Texas Civil Statutes: OAA — Chapter 71, Laws 1967, S. B. 45, amending Article 695c, Section 20 to add "or has resided . . . at least twenty-five years;" (State's PA Plan was amended effective 9/1/67). AB — Article 695c, Section 12 APTD — Article 695c, Section 16-B AFDC — Article 695c, Section 17

APPENDIX E

(seal)

THE SECRETARY OF HEALTH,
EDUCATION, AND WELFARE
Washington, D. C. 20201

Nov. 10, 1969

Dear Barry:

Thank you for your letter of September 29, 1969, on behalf of Mr. Anthony B. Ching of Tucson, who suggests that there is a conflict between Arizona law and Federal law regarding Arizona's provision that participation in the adult public assistance programs is limited to individuals who are citizens of the United States or who have been residents of the United States for a total of 15 years. We do not believe that there is any conflict.

The Arizona provision is not required by Federal law. If Arizona were to drop this provision, and pay assistance to any otherwise eligible individual, whether citizen or alien, there would be no Federal question, and Federal matching would be available for the resulting payments under the State's programs.

On the other hand, the Arizona provision is not precluded by Federal law. Titles I, X, and XIV of the Social Security Act specify that the Secretary shall not approve a State public assistance plan which imposes any citizenship requirement which excludes any citizen of the United States. States, at their option, may exclude non-citizens. We view the Arizona provision, which excludes a noncitizen who has not resided in the United States for a total of 15 years, as a permissible citizenship requirement which Arizona may choose to impose.

The recent decision of the United States Supreme Court in the case of *Thompson v. Shapiro* prohibited the States from imposing requirements of durational residence *in the State* as a condition of eligibility for public assistance. We do not read this case as

precluding citizenship requirements which apply to aliens who have not resided *in the United States* for a specified period.

The problem of the exclusion of certain aliens from Arizona's programs could, of course, be solved in several ways: 1) a change in the Arizona provision; 2) a change in the Federal law; or 3) an extension by the courts of the decision in the *Thompson* case. I appreciate the opportunity to review the claims of Mr. Ching and respond to the problem.

With best wishes,

(signed Bob Finch)
Secretary

Honorable Barry Goldwater
United States Senate
Washington, D. C.

FILE COPY

IN THE

Supreme Court of the United States

October Term 1970

No. 609

JOHN O. GRAHAM, Commissioner,
Department of Public Welfare,
State of Arizona,

Appellant,

versus

CARMEN RICHARDSON, et al.,

Appellees.

Appeal from the United States District Court
for the District of Arizona

APPELLANT'S BRIEF

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IN THE

Supreme Court of the United States

October Term 1970

No. 609

JOHN O. GRAHAM, Commissioner,
Department of Public Welfare,
State of Arizona,

Appellant,

versus

CARMEN RICHARDSON, et al.,

Appellees.

Jurisdictional Statement filed August 28, 1970.
Probable Jurisdiction Noted December 14, 1970.

APPELLANT'S BRIEF

Appellant appeals from the amended judgment of the United States District Court for the District of Arizona granting the appellees' motion for summary judgment declaring Arizona's United States citizenship requirement as well as the fifteen (15) year durational residency requirement provided by Arizona Revised Statutes unconstitutional and enjoining appellant from enforcing these provisions.

OPINION BELOW

The opinion of the District Court is reported at 313 F.Supp. 34 (1970). It is set out in The Appendix at pp. 44-48.

JURISDICTION

This appeal is taken pursuant to Title 28 of the United States Code, Section 1253.

In their first amended complaint, appellees, who are resident aliens lawfully admitted to the United States, sought the convening of a three-judge court and declaratory and injunctive relief under the Civil Rights Act, Title 42 United States Code §§ 1981, 1983, 2000(d) and 2000(e); the United States Constitution, in particular, the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment and the Commerce Clause of Article I, § 8, Cl. 3; and the Federal Social Security Act providing for Aid to the Permanently and Totally Disabled persons, Title 42, United States Code § 1351 et seq.

A three-judge court was convened pursuant to Title 28 United States Code §§ 2281 and 2284. Thereafter, on May 27, 1970, the three-judge court issued its decision granting appellees' motion for summary judgment and denying appellant's motion for summary judgment. The amended judgment appealed from was issued on June 26, 1970. The text of the order is set forth at pages 49-50 of the Appendix. Appellant's notice of appeal to this Court was filed in the United States District Court for the District of Arizona on July 9, 1970 (Record, item 19). Appellant's Jurisdictional Statement was filed on August 28, 1970. This Court noted probable jurisdiction on December 14, 1970.

STATUTORY PROVISIONS INVOLVED

"A.R.S. § 46-233. *Eligibility for general assistance*

"A. No person shall be entitled to general assistance who does not meet and maintain the following requirements:

"1. Is a citizen of the United States, or has resided in the United States a total of fifteen years."

"A.R.S. § 46-272. *Eligibility for blind assistance*

"Assistance shall be granted to any person who meets and maintains the following requirements:

"4. Is a citizen of the United States, or has resided in the United States a total of fifteen years."

"A.R.S. § 46-252. *Eligibility for old age assistance*

"Assistance shall be granted under this article to any person who meets and maintains the following requirements:

"2. Is a citizen of the United States, or has resided in the United States a total of fifteen years."

QUESTIONS PRESENTED

42 U.S.C. § 1352(b)(2), Aid to the Permanently and Totally Disabled, gives the Secretary (of Health, Education and Welfare) authority to approve any welfare plan which fulfills conditions specified in subsection (a) of that act, except he shall not approve any plan imposing any citizenship requirement which excludes any citizen of the United States. There are similar provisions for Old Age Assistance, 42 U.S.C. § 302(b)(3); Aid to the Blind, 42 U.S.C. § 1202(b)(2); Aid to the Aged, Blind, or Disabled, 42 U.S.C. § 1382(b)(2). Pursuant to 42 U.S.C. § 1302 the Secretary has published a Handbook of Public Assistance Administration which Part IV §§ 3720 and 3730 read as follows:

> "A state plan under titles I, X, XIV and XVI may not impose, as a condition of eligibility, any citizenship requirement which excludes any citizen of the United States. . . .
>
> "Where there is an eligibility requirement applicable to non-citizens, state laws may, as an alternative to excluding all non-citizens, provide for qualifying non-citizens, otherwise eligible, who have resided in the United States for a specified number of year."

The questions presented are:

1. Whether, in its application to these appellees, Arizona Revised Statutes §§ 46-233.A.1, 46-252.2, 46-272.4, enacted pursuant to federal law are violative of the United States Constitution in that they constitute:

A. An undue burden on appellees' right to travel; and

B. An infringement of the Equal Protection Clause contained in the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Carmen Richardson, the named appellee, is a lawfully admitted alien. She has been a continuous resident of the State of Arizona for thirteen years. Mrs. Richardson was sixty-four years and nine months of age at the time of the filing of the complaint. Prior to the District Court decision she was eligible for benefits under the Aid to the Permanently and Totally Disabled (APTD) or Old Age Assistance (OAA) but for the U. S. citizenship requirement or, in lieu of U. S. citizenship, the fifteen year residency requirement for aliens provided by Arizona law.

Appellee brought this as a class action attacking the constitutionality of these provisions of Arizona welfare laws: (1) General Assistance, (2) Assistance for the Blind, and (3) Old Age Assistance (*supra*). The claimed infirmity in all the Arizona statutes mentioned *supra* is the U. S. citizenship requirement or, in lieu of U. S. citizenship, the fifteen year residency requirement for aliens violates the constitutional right to travel, *Shapiro v. Thompson,* 394 U. S. 618 (1969), and the Equal Protection Clause of the Fourteenth Amendment to the U. S. Constitution.

Both parties moved for summary judgment before a three-judge District Court convened pursuant to 28 U.S.C. §§ 2281 and 2284. Jurisdiction was conferred upon the Court by 28 U.S.C. §§ 1343, 2201, 2202 and 42 U.S.C. § 1983.

On May 27, 1970 the Court filed an opinion granting appellees' motion and relying on *Shapiro v. Thompson, supra., Dandridge v. Williams,* 397 U.S. 471 (1970), and *Takahashi v. Fish and Game Commission,* 334 U.S. 410 (1948) held that Arizona Revised Statutes §§ 46-233.A.1, 46-252.2 and 46-272.4 violate the Equal Protection Clause of the Fourteenth Amendment and constituted an impermissible burden on appellees' constitutional right to travel.

On July 30, 1970 the three-judge court ordered the amended judgment of June 26, 1970 stayed, excluding the named appellee, pending judicial review to this Court. Appendix p. 69.

ARGUMENT

POINT I

THE EQUAL PROTECTION GUARANTEE CONTAINED IN THE FOURTEENTH AMENDMENT TO THE U. S. CONSTITUTION DOES NOT PROHIBIT A STATE FROM FAVORING CITIZENS OVER ALIENS IN THE DISTRIBUTION OF WELFARE BENEFITS.

The validity of Arizona's statutes restricting welfare benefits to aliens is challenged as denying the appellee equal protection of law guaranteed under the Fourteenth Amendment. The alien appellee, being a resident of the United States, is entitled to the protection vouchsafed by these guarantees. *Yick Wo v. Hopkins,* 118 U.S. 356, 369 (1885). She, along with citizens of the United States, has the right of seeking a livelihood. Primarily, she has the same right and privilege as citizens under similar conditions to engage in gainful employment — unless they pertain to the regulation or distribution of the public domain, the common property or resources of the state, the devolution of real property, public works, or benefits accruing from public monies. *McCready v. Virginia,* 94 U.S. 391, 396 (1876); *Patsone v. Pennsylvania,* 232 U.S. 138, 145-146 (1914); *Hauenstein v. Lynham,* 100 U.S. 483 (1879); *Blythe v. Hinckley,* 180 U.S. 333, 341-342 (1901); *Heim v. McCall,* 239 U.S. 175 (1915).

The Fourteenth Amendment does not prevent a state from distinguishing citizens and aliens if the distinction bears a reasonable relationship to a legitimate state objective. Class legislation must be reasonable in purpose and method and apply alike to all persons within the class. *Muller v. Oregon,* 208 U.S. 412 (1908). The standard the Supreme Court uses when determining whether a statute violates the Equal Protection Clause is set forth in *McGowan v. Maryland,* 366 U.S. 420 (1961). Simply stated,

statutory discriminations will not be set aside if any state of facts may reasonably be conceived to justify them.[1]

Certain provisions of the United States Constitution are couched in such unqualifiedly prohibitory terms that aliens can and do invoke their protection. However, the rights which are capable of protection are those which are regarded as fundamental. For example, the appellee would be entitled to relief by Writ of Habeas Corpus, *Yick Wo v. Hopkins, supra;* protection from the passage of Bills of Attainder or Ex Post Facto Laws, *Chinese Exclusion Case. Chae Chan Ping,* 36 F. 131 aff'd. 130 U. S. 581 (1889); from being made to answer for a capital or otherwise infamous offense without presentment of indictment. *Fong Yue Ting v. U. S.,* 149 U.S. 698, 739 (1893); and from being compelled to give self-incriminatory testimony, *Wing Wong v. United States,* 163 U.S. 228 (1896).[2]

Welfare benefits are discretionary with the states and since the program can be legislated away at any time, such benefits cannot be considered a constitutionally protected right. In *Truax v. Raich,* 239 U.S. 33 (1915), this Court struck down an Arizona statute which required restricted hiring of alien employees. The Court recognized the power of the state to make reasonable classifications in legislating to promote the health, safety, morals and welfare of those within its jurisdiction; but that power cannot be so broadly conceived as to bring it into the domain of exclu-

[1]"The standard under which this proposition is to be evaluated has been set forth many times by the Court. Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the State a wide scope of discretion in enacting laws which attack some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, they result in some inequalities. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland, supra* at p. 425. Also see, *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61 (1911).

[2]An authoritative annotation on the rights of aliens may be found at 68 L. Ed. 255 (1925).

sive federal control. The Court noted that the power to control immigration is vested solely in the federal government and that the states may not deprive properly admitted aliens of their right to earn a livelihood, reasoning that such a policy would be tantamount to denying their entrance and abode.

The same rationale was followed by the Court in *Takahashi v. Fish and Game Commission, supra.* In that case a California statute barring issuance of commercial fishing licenses to persons "ineligible to citizenship" which classification included resident alien Japanese and precluded them from earning their living as commercial fishermen in California's coastal waters was invalidated. *Id.,* p. 413. The Court found this an impermissible impediment noting that the law denied these people the opportunity of earning a living as fishermen and, therefore, interfered with their right of residing where they chose.

These cases are easily distinguishable from the case at bar. The State of Arizona does not interfere with an alien's opportunity to work. It cannot be said that a qualifying period before an alien may receive welfare benefits constitutes a prohibitive interference with an alien's right of seeking employment.

A legitimate state interest exists. For example, a state has a substantial interest in preventing residents lacking the desire to become citizens from holding high elective offices, serving as judges and attorneys or working in positions sensitive to state or national security. A state may restrict an alien's opportunity for employment in certain instances. *Crane v. New York,* 239 U.S. 195 (1915); *Heim v. McCall, supra.* No reason is shown why a different constitutional rule should obtain in the area of welfare benefits. (This proposition is fully explored in Point Heading III.)

Judicial notice should be taken that states have been experiencing great difficulty in the administration of their welfare programs. The resources available for this type of program are very limited. It is, therefore, not unreasonable for a state to favor

citizens over aliens in the allocation of this fund. This Court's words in *Dandridge v. Williams, supra,* are illuminating.[3] The Court noted that states have wide discretion in the distribution of welfare benefits and classifications made by state law. Distribution of benefits will not be set aside if they have some reasonable basis.

For the Court to hold the state's alien restriction invalid would undermine the spirit of cooperative federalism implicit in the joint federal-state administration of welfare. *King v. Smith,* 392 U.S. 309 (1968).

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[3]"In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequity.' *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific.' *Metropolis Theatre Co. v. City of Chicago,* 228 U.S. 61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan v. Maryland,* 366 U.S. 420, 426.

"To be sure, the cases cited, and many others enunciating this fundamental standard under the Equal Protection Clause, have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different Constitutional standard. See *Snell v. Wyman,* 281 F.Supp. 853 aff'd. ..... U.S. ..... . It is a standard that has consistently been applied to State legislation restricting the availability of employment opportunities. *Goesaert v. Cleary,* 335 U.S. 464; *Kotch v. Board of River Port Pilot Commissioners,* 330 U.S. 552. Also see *Flemming v. Nestor,* 363 U.S. 603. And it is a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of wise economic social policy." *Dandridge v. Williams, at pp.* 485-486.

POINT II

THE RIGHT TO TRAVEL DOES NOT EXTEND TO ALIENS PLACING THEM ON A PARITY WITH CITIZENS IN THE SHARING OF THE WEALTH OF THE NATION OR THE STATE.

Right to travel cases regardless of where the right was conceived to be grounded have, on their facts and in their holdings, extended only to the United States citizens.[4] Clearly, an alien cannot claim this protection. Even if aliens were accorded this protection, it is not impinged on the facts of this case. Aliens are free to travel through, reside and work in Arizona. Were this not the case the Arizona Civil Rights Act, A.R.S. § 41-1441 et seq., would not exist. The fact that they are not eligible for welfare without meeting a national residency requirement has a no more chilling effect on immigration to the State than the summer heat.

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[4]*Cornfield v. Coryell,* 6 Fed Cases 546, 552 (1823). The right of free interstate passage springs from the Privileges and Immunities Clause embracing all United States citizens; *Passenger cases,* 7 How. 283 (1849). Unencumbered movement between states is a right of national citizenship emanating from the Commerce Clause; *Paul v. Virginia,* 8 Wall. 168, 180 (1868). Privileges and Immunities Clause confers citizens with uninhibited ingress and egress between the several states; *Ward v. Maryland,* 12 Wall. 418 (1870), citizens are guaranteed passage through the States by the Privilege and Immunities Clause; *Crandall v. Nevada,* 6 Wall. 35, 44 (1867), free movement throughout the nation is implicit in national citizenship; *Edwards v. California,* 314 U.S. 160 (1941), the right to travel is integral to national citizenship and flows from the Commerce Clause. (Douglas, J. concurring, joined by Black and Murphy viewed the right to travel incidental to "national citizenship" and protected by the Privileges and Immunities Clause of the Fourteenth Amendment, *supra* 178); *Kent v. Dulles,* 357 U.S. 116, 125-9 (1958), couched the freedom to travel in Fifth Amendment Due Process terms and extending to all national citizens; in *United States v. Guest,* 383 U.S. 745, 757-8 (1966), Mr. Justice Steward was content to recognize a constitutional right to travel "fundamental to the concept of our Federal Union." Likewise, in *Shapiro v. Thompson,* 394 U.S. 618, 629-30 (1969) and *Oregon v. Mitchell,* 400 U.S. ..... (1970), the citizens' unfettered rights to travel without identifying a specific constitutional rationale was upheld.

Restrictions on indigent aliens are an integral part of the Congressional scheme. Title 8 U.S.C. § 1182(a)(7) prevents admitting ill aliens whose conditions will diminish their earning power. Title 8 U.S.C. § 1182(a)(8) bars pauper aliens. Aliens likely to become public charges may be excluded. Title 8 U.S.C. § 1182(a)(15). Aliens may also be required to post bond before admission in case they later become public charges. Title 8 U.S.C. § 1183. They may even be deported if it appears entry was gained with the intention of becoming a public charge. Title 8 U.S.C. § 1251. Since Congress requires aliens to have a viable earning potential, it is unreasonable to think that the states would be required to adopt a contrary policy.[5] The right to earn

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[5]This policy is also articulated by the Social Security Act, 42 U.S.C. § 1352; 42 U.S.C. § 302(b)(3); 42 U.S.C. § 1202(b)(2); 42 U.S.C. § 1382(b)(2). Under 42 U.S.C. § 1302 the Secretary of Health, Education, and Welfare is charged with making rules and regulations necessary for the efficient administration of the Social Security Act. Pursuant to this section, the Secretary of Health, Education, and Welfare has promulgated § 201.3(d), Title 45, Code of Federal Regulations, which reads as follows:

"Determinations as to whether State plans . . . originally (sic) meet, or continue to meet, the requirements for approval are based on relevant Federal statutes and regulations and *the requirements and policies set forth in the Handbook of Public Assistance Administration* and other official issuances to the States." (Emphasis added.)

Sections 3720 and 3730, Part IV, of the Handbook read respectively as follows:

"A State plan under Titles I, X, XIV (aid to permanently and totally disabled) and XVI may not impose, as a condition of eligibility, any citizenship requirement which excludes any citizen of the United States." (Expression in parentheses added.)

"Where there is an eligibility requirement applicable to noncitizens, *State* plans *may*, as alternative to excluding all noncitizens, *provide for qualifying noncitizens otherwise eligible, who have resided in the United States for a specified number of years.*" (Emphasis added.)

The congressional and agency scheme is clearly etched by the above statutes and regulations to the effect that the states are authorized to impose restrictions upon the conditions of granting welfare to aliens. Whatever doubt may remain vanishes in light of the committee report accompanying the Social Security Bill of 1935, H.R. Rep. No. 615, 82d Cong., 1st Sess. (1935) p. 18, § (b)(3), to the effect that "a State may, if it wishes, assist only those who are citizens, but must not insist on their having been born citizens for a specific period of time." (Appendix p. 38).

(Continued on next page)

a living is not here imposed upon as it was in *Truax v. Raich, supra,* and *Takahashi v. Fish and Game Commission, supra.* Neither can it be said that eligibility for welfare rises to the dignity of the opportunity of earning a living. Employment Act of 1946, 15 U.S.C. 1021 et seq.; *Truax v. Raich, supra.*

This Court has frequently recognized the state's power of excluding aliens from many types of jobs. *Crane v. People of the State of New York, supra.* Admitting that the elemental necessity of being able to seek a livelihood can be partially withheld from aliens but asserting that welfare eligibility must be extended to them shows the spurious analysis of the appellees' argument and its lack of foundation either in reason or in the decisions of this Court.

Pursuing appellees' reasoning full circle requires some rather bizarre results. Were the state to abolish welfare completely, this would offend appellees' conception of the Supremacy Clause of the U. S. Constitution by preventing aliens from living in the jurisdiction because of the unavailability of welfare payments. Under Appellees' theory welfare would be required for aliens. The anamolous situation of extending benefits to aliens that are denied to citizens would be styled a denial of Equal Protection. The State would therefore be obligated by the Fourteenth Amendment to extend welfare to citizens. The underlying conclusion which must be drawn from these propositions is that welfare benefits are secured to all *persons* on the basis of the Immigration and Naturalization Act, 8 U.S.C. § 1101 et seq. and the Supremacy Clause.

Further, it is incumbent on an administrative agency to scrupulously adhere to its own regulations. *Pacific Molasses Company v. F. T. C.,* 356 F.2d 386 (1966). Likewise, it is axiomatic in administrative law that the regulations of the administering agency be given due deference by the courts. *Red Lion Broadcasting Co., Inc. v. F.C.C.* 395 U.S. 367, 381 (1969). Here the plaintiff is asking the court not only to ignore explicit congressional intent but also the established policy of the administering agency.

POINT III

ARIZONA HAS THE RIGHT TO DISTRIBUTE ITS WEALTH BY LIMITING THE ENJOYMENT THEREOF TO U. S. CITIZENS AS AGAINST ALIENS.

This Court has recognized the right of the state to husband its common property or resources for the use of its citizens. Upholding a New York law prohibiting hiring aliens on public works projects, the Court found that aliens are not members of the state as a corporate body, and for this reason state monies may be reserved for the benefit of its citizens. Neither does such a restriction contravene Due Process because of the state's right to prefer citizens. *Crane v. People of the State of New York, supra.* In the lower court opinion, *People v. Crane,* 108 N.E. 427, 429 (1915) *aff'd.,* 239 U.S. 195 (1915) Judge Cardozo noted that the state "may discriminate between citizens and aliens in its charitable institutions, or in other measures for relief of paupers. . . ." *Id.* at p. 429. "In its war against poverty, the State is not required to dedicate its own resources to citizens and aliens alike." *Id.* at p. 430. *Heim v. McCall, supra* is to the same effect. These cases related, on their facts, to the exclusion of aliens from employment on public works, but the premise that aliens need not be accorded all rights of citizens without contravening their rights of Equal Protection or Due Process has long been recognized.[6] By way of dicta this Court has recognized the state's power to set a hierarchy of needs excluding aliens from sharing in the special property of the state. *Truax v. Raich, supra* at 39-40.[7]

[6]This author is aware of no case extending any substantive due process rights to aliens. *Griswold v. Conn.,* 381 U.S. 479 (1965); *Shapiro v. Thompson,* 394 U.S. 618 (1969).

[7]The discrimination defined by the act [preventing aliens from engaging in occupations common in the community thus impeding their migration into the jurisdiction and impinging the exclusive federal control of emigration] does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other states." *Truax v. Raich,* pp. 39-40.

Similarly in *Takahashi v. Game and Fish Commission, supra,* the Court stated that restrictions on the rights of aliens are permissible where the restrictions relate to actual differences and are reasonably in pursuance of legitimate statutory purposes. This is true even if the restraints do not cover the full field of involvement. *Patsone v. Pennsylvania, supra* at 144. The state's concern in being allowed to allocate tax dollars in the manner dictated by the exigencies of local conditions falls explicitly within the purview of special state interest. Speaking to this problem in the context of Substantive Due Process, this Court reasoned that the "requirements of due process are a function not only of the extent of the governmental restriction imposed (citing cases), but also of the extent of the necessity for its restriction." *Zemel v. Rusk,* 381 U.S. 1, 14 (1964).

The maelstrom of chronic social problems requires each state to satisfy those needs that local experience shows to be the most pressing. Recognizing that this process imposes harsh results on some, *Dandridge v. Williams, supra,* found that, in spite of this fact, each state must be accorded considerable discretion in the allocation of its welfare resources. Arizona is confronted with a Hobson's choice: *which* of the needy will it feed? Unfortunately, it cannot be assumed that because social problems exist the state has the capacity to remedy them.

CONCLUSION

The decision below should be reversed. The permanent injunction vacated. Appellant's motion for summary judgment should be granted, and the complaint should be dismissed.

January 28, 1971

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 609

JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona

Appellant,

v.

CARMEN RICHARDSON, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

APPELLEES' BRIEF

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OCTOBER TERM, 1970

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Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

APPELLEES' BRIEF

QUESTIONS PRESENTED

In addition to the questions presented by the appellant, appellees submit that the following questions are also presented in this case:

1. Whether, in their application to the appellees, the Arizona statutes requiring resident aliens to have fifteen year residency in the United States as a condition to receive welfare benefits are in conflict with the Supremacy Clause, Article VI, Paragraph 2 of the Constitution, in that they:

A. Are invalid as they conflict with the Treaties made by the United States and the Public Policy of the United States?

B. Are invalid as they infringe on the Power of Congress in the field of immigration and naturalization?

C. Are invalid as they violate the Civil Rights Act of 1870 and the Civil Rights Act of 1964?

Appellees further submit that the Arizona statutes are not enacted pursuant to federal law as claimed by the appellant in their questions presented because (1) the Social Security Act does not expressly permit this type of state legislation; and (2) the Social Security Act as interpreted by HEW merely permits but does not require this type of state law.

ARGUMENT

I

THE ARIZONA STATUTES REQUIRING RESIDENT ALIENS TO HAVE FIFTEEN YEAR RESIDENCY IN THE UNITED STATES AS A CONDITION TO RECEIVE WELFARE BENEFITS ARE INVALID UNDER THE SUPREMACY CLAUSE AS THEY CONFLICT WITH THE TREATIES MADE BY THE UNITED STATES AND THE PUBLIC POLICY OF THE UNITED STATES

The power of the United States to make treaties is derived from both the Constitution,[1] and that which is inherent in a sovereign nation. Any conflict between state law and the treaties must be resolved in favor of the treaties under the command of the Supremacy Clause. *Asakura v. Seattle*, 265 U.S. 332 (1924).

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[1] Article I, Section 10 and Article II, Section 2, Clause 2 of the Constitution.

After World War II, this nation, together with many other nations, became signatory to the *United Nations Charter*, 59 Stat 1031. Prior decision of this Court indicated that it is a treaty and validly constitutes a limitation on the rights of the states under the Supremacy Clause. *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1954).

The Preamble to the *United Nations Charter*, states in part as follows:

> "We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, and for these ends to practice tolerance and live together in peace with one another as good neighbors, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples, have resolved to combine our efforts to accomplish these aims.* * *"

Chapter 1, Article 1, Subparagraphs (2) and (3) of the UN Charter state, in part as follows:

"The Purposes of the United Nations are:

> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;* * *"

Finally, *Chapter IX, Articles 55 and 56 of the Charter* state, in part, as follows:

Article 55

"With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of people, the United Nations shall promote;* * *

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

Article 56

"All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

This *Charter*, devised and entered into by the great powers of the world at the end of World War II, indicates clearly not only the desire but the necessity that human freedoms be protected without respect to race or creed if international strife such as was suffered in World War II is to be avoided. This *Charter*, with the high and noble purposes of avoiding war and improving the lot of mankind generally, must be given the broadest and most liberal interpretation possible.

It requires no stretch of the imagination but only a plain reading of the *Charter* to realize that it was intended to prevent just such discrimination and lack of equality as presented in this case. *Article 56* above quoted specifically states that each member nation will take joint and separate

action for the achievement of the protection of human rights and freedoms without discrimination. It is therefore incumbent upon this Court to make certain that these fundamental principles are not violated within the boundaries of the United States of America.

Moreover, the named appellee is a resident alien of Mexican nationality. Both this nation and Mexico are signatories to the *Charter of the Organization of American States* (OAS), 2 UST 2394 (1951). The OAS Charter, in addition to re-affirming the principles of the United Nations Charter, declares as a principle that:

> "The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex." Chapter II, Article 5, Clause j.

The *OAS Charter* further provides:

Chapter VII

Social Standards

Article 28

> "The Member States agree to cooperate with one another to achieve just and decent living conditions for their entire populations."

Article 29

> "The Member States agree upon the desirability of developing their social legislation on the following bases: a) *All human beings, without distinction* as to *race, nationality*, sex, creed or social condition, have the right to attain material well-being and spiritual growth under circumstances of liberty, dignity, *equality of opportunity*, and economic security; b) Work is a right and a social duty; it shall not be considered as an article of commerce; it demands respect for freedom of association and for the dignity of the worker; and it is to be performed under conditions that ensure life, health and a decent standard of living, *both during the working years and during old age, or when any circumstance*

> *deprives the individual of the possibility of working.*" (Italics added)

The argument that state laws which discriminate as to aliens may be invalid as being inconsistent with these multilateral treaties entered by the United States is not a novel one.

In *Oyama v. California*, 332 U.S. 632 (1948), where at page 673 Mr. Justice Murphy and Mr. Justice Rutledge in a concurring opinion stated:

> "Moreover, this nation has recently pledged itself, through the United Nations Charter to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. The Alien Land Law stands as a barrier to the fulfillment of that national pledge. Its inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned."

And at pages 649, 650 Mr. Justice Black and Mr. Justice Douglas in a concurring opinion state:

> "There are additional reasons now why that law stands as an obstacle to the free accomplishment of our policy in the international field. One of these reasons is that we have recently pledged ourselves to cooperate with the United Nations to 'promote * * * universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.' How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?"

There as here the same question can be asked. How can the United States be faithful to its pledge in solemn treaty with other countries if the states can be allowed to deprive resident aliens the barest form of subsistence which its own citizens are entitled to? To permit this would make mock-

ery of the United States in the eyes of other nations and to discredit this great nation's position as the leader of the "free" and "democratic" world. On the other hand, invalidation of the state laws here would strengthen our relationship with all foreign nations, improve our image in the weaker countries, especially in Latin-America, and to make into reality instead of mere hope, the inscription on the pedestal of the Statue of Liberty.[2]

II

THE ARIZONA STATUTES REQUIRING RESIDENT ALIENS TO HAVE FIFTEEN YEAR RESIDENCY IN THE UNITED STATES AS A CONDITION TO RECEIVE WELFARE BENEFITS ARE INVALID UNDER THE SUPREMACY CLAUSE AS THEY INFRINGE ON THE POWER OF CONGRESS TO REGULATE IMMIGRATION AND NATURALIZATION

The Constitution provides that Congress shall have power to regulate foreign commerce, to establish uniform rule of Naturalization, and together with the President to make and ractify treaties.[3] Impliedly, Congress has the sole power to regulate immigration. *Fong Yeu Ting v. United States*, 149 U.S. 698, 713 (1893). Attempts by a state which infringe upon Congressional powers in this field must be declared void. *Chy Lung v. Freeman*, 92 U.S. 275 (1876).

In Takahashi v. Fish and Game Commission, 334 U.S. 410, this Court said:

> "The federal government has broad constitutional powers in determining what aliens shall be admitted

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[2]Give me your tired, your poor,
Your huddled masses yearning to be free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me.
I lift my lamp beside the golden door!–*Emma Lazarus.*

[3]Article 1, Section 8, Clauses 3 and 4 of the Constitution. See also note 1, supra.

> to the United States, the period they may remain, regulation of their conduct before naturalization and the terms and conditions of their naturalization. See *Hines v. Davidowitz*, 312 U.S. 52, 66. Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration and have accordingly been held invalid." 334 U.S. at 419.

Pursuant to that grant of power, Congress has enacted a comprehensive scheme of legislation governing immigration and naturalization. Although paupers and persons of questionable means to earn a living are disfavored and excludable under the immigration laws, Congress has recognized that circumstances may change after one's arrival in this country so as to cause him to become a public charge. This humanitarian view is reflected in the immigration laws providing for the deportation of a resident alien who becomes a public charge within five years after his entry into the United States from *causes not affirmatively shown to have arisen after his entry*.[4] Moreover, wilful deprivation of rights and privileges of an alien is a Federal crime.[5]

On the other hand, the Arizona legislation deprives an alien, who, through no fault of his own, becomes indigent after his arrival in the state, the basic means of subsistence. These aliens are denied disability, old age or aid to the blind benefits. To these unfortunate aliens who are otherwise not deportable, returning to their countries of origin

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[4] 8 U.S.C. Section 1251 (a)(8).

[5] 18 U.S.C. Section 242.

may well be the only resort. The abandonment of residence in the United States usually results in the abandonment of residence for the purposes of naturalization. Thus, the state statutes have, not only a chilling, but a direct effect on immigration and naturalization.

Examination of Arizona's statutes in light of the immigration and naturalization laws leads to the following inevitable conclusions: (1) the fifteen year durational residency requirement is a clear invasion of a federally pre-empted area; and (2) with respect to aliens who become public charges due to reasons arising after their immigration, any residence or citizenship requirement would be in conflict with the design of the federal laws.

III

THE ARIZONA STATUTES REQUIRING RESIDENT ALIENS TO HAVE FIFTEEN YEAR RESIDENCY IN THE UNITED STATES AS A CONDITION TO RECEIVE WELFARE BENEFITS ARE INVALID UNDER THE SUPREMACY CLAUSE AS THEY VIOLATE THE CIVIL RIGHTS ACTS VALIDLY PASSED BY CONGRESS PURSUANT TO THE FOURTEENTH AMENDMENT

In *Takahashi v. Fish and Game Commission, supra,* this Court citing with approval *Yick Wo v. Hopkins,* 118 U.S. 356 (1885), held that the *Civil Rights Act of 1870 (42 U.S.C. 1981)* was applicable to aliens.

> *42 U.S.C. #1981* provides: "All persons within the jurisdiction of the United States shall have the same right in every state and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

The Court in *Takahashi* went on to say:

> "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide "in any state" on an equality of legal privileges with all citizens under nondiscriminatory laws." 334 U.S. at 420

Moreover, the *Civil Rights Act of 1870* is now butressed by the *Civil Rights Act of 1964. 42 U.S.C. § 2000(d)* of that Act provides:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

This section, adopted pursuant to the Fourteenth Amendment, correctly employs the word "person" and not "citizen". Unquestionably, it encompasses lawfully admitted aliens as well as citizens.

All the Arizona public assistance programs considered here fall within the language of 42 U.S.C. § 2000(d) since they are categorical assistance programs financially assisted under the federal social security act. The citizenship requirement and the fifteen year durational residency requirement constitute an exclusion from participation in and a denial of the benefits of these programs on the basis of national origin, since aliens are generally defined by their having been born outside the United States. Further, since the excluded resident aliens in Arizona are predominantly Mexican nationals the discrimination is also based on race and color.

Arizona statutes, in denying equal benefit to resident aliens, collides with the national policy enunciated by Congress in furtherance of the Fourteenth Amendment. The national law must have the right of way.

IV

THE ARIZONA STATUTES REQUIRING RESIDENT ALIENS TO HAVE FIFTEEN YEAR RESIDENCY IN THE UNITED STATES AS A CONDITION TO RECEIVE WELFARE BENEFITS ARE UNCONSTITUTIONAL AS THEY OFFEND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

The Equal Protection Clause of the Fourteenth Amendment extends protection to "all persons" and therefore include aliens. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886); *Truax v. Raich,* 239 U.S. 33 (1915). Discrimination on the basis of alienage, even though not one singled out against a particular race or nationality, affects a "disadvantaged minority" and is therefore subject to "strict judicial scrutiny," and confined "within narrow limits." *U.S. v. Carolene Products Co.,* 304 U.S. 144, 152 n.4 (1938) *Takahashi v. Fish and Game Comm'n,* 334 U.S. 410, 420 (1948).

It is beyond dispute that the Arizona statutes create two classes of needy individuals in the determination of eligibility for its adult public assistance programs. On the sole basis of alienage, resident aliens lacking the fifteen-year durational residency requirement who are unfortunate enough to become indigent due to illness, disability or old age are denied benefits which may be the very means for them to subsist. Such a classification constitute an invidious discrimination denying them equal protection of the state's laws.

Arizona urges that its statutes are justified because in the area of social welfare legislation the states are permitted wide discretion in the classifications made by its laws in the distribution of benefits as long as there exists some "reasonable basis" to sustain such classifications. *Dandridge v. Williams,* 397 U.S. 471 (1970). The *Dandridge* case is distinguishable from this case on two important grounds. First, the classification there is *not* based on race, color or nationality and thus not inherently suspect. *Takahashi v. Fish and Game Comm'n, supra.* Secondly, the state did not

exclude any particular group from the benefits—it simply limited the amount of payment per family. Since the classification here is one which is inherently suspect, "any rational basis" is not enough to sustain the classification. The state must come forth with a "compelling state interest" to justify the discriminatory statutes.

Arizona advanced the argument that its classification should be sustained because a state may, in conserving its resources, favor its own citizens at the expense of not aiding the resident aliens within its jurisdiction. In plain language, Arizona's purpose in enacting these statutes is to save money. However, the saving of welfare costs cannot be an independent ground for an invidious classification. *Shapiro v. Thompson*, 394 U.S. 618, (1969). Likewise, in *Goldberg v. Kelly*, 397 U.S. 254 (1970), this Court held that due process of law could not be denied welfare recipients simply on the grounds of fiscal consideration. 397 U.S. at 266. In fact, the *Shapiro* opinion intimated that such a basis for classification may well not meet the "rational basis" test under the traditional equal protection standards. 394 U.S. at 638.

Arizona also justified the discrimination under the theory that it is permitted to do so because of the *special public interest* a state has in preserving its money and property for its own citizens. This theory draws its support from *People v. Crane*, 214 N.Y. 154, 108 N.E. 427 (1915); aff'd sub nom. *Crane v. New York*, 239 U.S. 195 (1915); and *Heim v. McCall;* 239 U.S. 175 (1915). These cases upheld New York laws barring aliens from public works employment.

These decisions, decided some fifty-five years ago, were not based on good reason nor logic. They should not be relied on for the determination of this case. Both decisions were based largely on the antiquated premise that public employment is a privilege and not a right and that whatever is a privilege or a right may be dependent on citizenship. The privilege-right dichotomy should have no place

in the resolution of this case.[6] This Court has recently stated, "the constitutional challenge cannot be answered by the argument that public assistance benefits are a 'privilege' and not a 'right'." *Shapiro v. Thompson*, 394 U.S. at 627 n. 6. In *Goldberg v. Kelly, supra*, this Court again said, "Public assistance is * * * not mere charity, but a means to 'promote the general Welfare and secure the Blessings of Liberty to ourselves and our Posterity.'" 397 U.S. at 265.

Additionally, the California Supreme Court recently held that the California statute which prohibited employment of aliens on public works was unconstitutional as violative of equal protection of laws. The California decision expressly rejected the *Crane* rationale relying on the later decision of this Court in *Takahashi v. Fish and Game Commission, supra. Purdy and FitzPatrick v. California*, 79 Cal Rptr. 77, 456 P.2d 645 (1969).

The "special public interest" rule, justifying the limitation of expenses by discriminating against resident aliens is logically unsound. Resident aliens in Arizona pay all state taxes as well as federal taxes. They are required to serve in the United States Armed Forces on the same basis as citizens.[7] Resident aliens such as Carmen Richardson have lived in the state for many years, worked in the state and contributed to the economic growth of the state. Yet, she is denied the disability and old age benefits. On the other hand, newly arrived citizens, who have contributed far less, can receive these benefits under this Court's decision in *Shapiro v. Thompson, supra.*

Laws discriminating against aliens and the evolution of the "special public interest" rule justifying the discrimination, are based on the ground that aliens hold allegiance to foreign nations. The lack of "national allegiance" there-

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[6]Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 82 Harv. L. Rev. 1439 (1968).

[7]50 U.S.C. App. § 454(a)

fore makes them less deserving of rights commonly accorded to citizens. While this basis is proper to deny aliens attributes of citizenship such as the right to vote and the right to hold public office, it is not rational to use the same to deny resident aliens the right to employment or welfare benefits. Moreover, most resident aliens such as those of Mexican nationality in Arizona are illiterate or lacking an adequate knowledge of English which is a pre-requisite for naturalization.[8] To them, the lack of allegiance to the United States is not due to their own choosing.

The opinion in the court below striking down the Arizona statutes relied on this Court's prior decisions in *Takahashi v. Fish and Game Comm'n, supra* and *Shapiro v. Thompson, supra.* In *Takahashi,* this Court held that the California statute denying commercial fishing licenses to resident aliens ineligible for citizenship was unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment. The "special public interest" rule advocated by California was rejected by this Court in *Takahashi,* saying:

> "To whatever extent the fish in the three-mile belt off California may be 'capable of ownership' by California we think that 'ownership' is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so." 334 U.S. at 421.

The recent case of *Shapiro v. Thompson, supra,* deserves special mention. In *Shapiro,* this Court struck down the durational residency requirements enacted by the states as a condition to receive welfare benefits. Although factually the welfare applicants in *Shapiro* and the related cases are all citizens, the *Shapiro* decision should not be limited to citizens.

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[8] *Discrimination against Mexican aliens,* 38 George Washington Law Review 1091 (1970).

This Court held in *Shapiro* that the state's durational residency requirements had a "chilling effect" on the fundamental *right to interstate travel*, and since there was found to be no "compelling state interest" to justify these requirements, the state statutes violated equal protection of laws. Logically and historically, the *right to interstate travel* should and has been accorded to aliens and citizens alike. In his concurring opinion in *Shapiro*, Mr. Justice Stewart discussed the long established notion of the constitutional *right of interstate travel*. The 1915 decision of this Court in *Truax v. Raich supra*, was cited by Mr. Justice Stewart for the proposition that this right includes the right of "entering and abiding in any state of the Union." 394 U.S. at 642. In *Truax*, the Arizona statute requiring any employer of five or more employees to employ 80 per cent citizens was found by this Court to be a denial of equal protection of laws as to the alien employee about to be fired. Although the right to travel interstate as to aliens may be ascribed to the federal laws governing immigration rather than the Constitution, Arizona should no more be permitted to infringe upon that right which is granted by Congress than the right of interstate travel inherent in citizenship. Commands of both the *Supremacy Clause* and the *Fourteenth Amendment* pledging equal protection of laws demand that there must be a "compelling state interest" to justify the invidious discrimination.

Examination of the Arizona statute in light of the *Shapiro* decision makes it abundantly clear that the reasons advanced by the states in *Shapiro* found uncompelling by this Court should likewise be unpersuasive in their application to the discrimination as to resident aliens.

CONCLUSION

It is respectfully submitted that *Arizona Revised Statutes, (A.R.S.) Sections 46-233(A)(1); 46-272 (4) and 46-252(2)*, requiring either citizenship or a fifteen year durational resi-

dency in the United States as a condition of eligibility to receive adult categorical public assistance benefits, are, as to the appellees, unconstitutional as violative of both the Supremacy Clause and the Fourteenth Amendment to the Constitution of the United States. The decision of the court below should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Docket No. 609

JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona,

Appellant,

—v.—

CARMEN RICHARDSON, for herself and for all others similarly situated,

Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF *AMICUS CURIAE* OF THE LEGAL SERVICES FOR THE ELDERLY POOR PROJECT OF THE CENTER ON SOCIAL WELFARE POLICY AND LAW

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Interest of the *Amicus*

The Legal Services for the Elderly Poor Project of the Center on Social Welfare Policy & Law is funded by the Office of Economic Opportunity and sponsored by the National Council of Senior Citizens. Affiliated with the Columbia University School of Law, the Elderly Project

provides assistance in research and litigation to legal services and other organizations serving the elderly.

The elderly project has appeared before this court this term in *Messer* v. *Finch*, O.T. 1970 No. 768, as *amicus* in *Richardson* v. *Perales*, O.T. 1970 No. 108. The Center on Social Welfare Policy and Law submitted a brief *amicus curiae* in *Shapiro* v. *Thompson*, 394 U.S. 618 (1967) and was counsel *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

Recent statistics prepared by the Special Committee on Aging of the United States Senate indicate that about one-third of the 20 million persons aged 65 and older in the United States live in poverty; an additional one-tenth are on the poverty borderline. The elderly project has a continuing concern with questions involving the administration of public assistance programs which deny the needy elderly the assistance necessary to sustain life. The project was *amicus* in this case in the district court.

All parties have consented to the filing of this *amicus* brief.

I.

The equal protection clause forbids classifying to exclude needy individuals from benefits to which they are entitled solely on the basis of not possessing citizenship or 15 years residency.

The Arizona Public Assistance Program to provide assistance to the needy carves out an exception for resident aliens who have not resided in the United States for 15 years. Such persons are not entitled to assistance, even though they meet all other eligibility requirements for aid to the blind, aged or disabled. Such exclusion is forbidden:

> When the existence of a distinct class is demonstrated and it is further shown that the laws, as written or as applied, single out this class for different treatment, not based on some reasonable, justification, the guarantees of the Constitution have been violated. *Hernandez* v. *Texas,* 347 U.S. 475, 478 (1954).

In the instant exclusion, not only is there no rational basis for this classification, but it flies in the face of common sense to favor the United States citizen who may have just arrived in Arizona over the resident alien who may have lived in Arizona for many years, paid taxes, and otherwise contributed to the growth and development of the state. Cf. *Purdy & Fitzpatrick* v. *California,* 79 Cal. Reptr. 77, 456 P.2d 645 (1969). Entitlement to benefits should be predicated not on the possession of citizenship, but on the factors of need at the minimum, and at the maximum, some type of measure of community commitment.

In fact, laws which have an adverse effect on aliens raise several problems of equal protection. Patterns and

practice in the application of laws which harm different nationalities have been held to deny equal protection and due process. *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886). Classifications based on alienage are inherently suspect and subject to rigid scrutiny by the courts. *Takahashi* v. *Fish & Game Commission,* 334 U.S. 14 (1948).[1] In *Carrington* v. *Rash,* 380 U.S. 87 (1964) this court invalidated an exclusion of army personnel from voting. In the exclusion present in this case where appellees face the "brutal need" described in *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), a striking parallel emerges. Both groups are denied fundamental and crucial rights and needs solely because of irrelevant factors. Such a classification to exclude is also drawn too broadly. See, e.g., *Shelton* v. *Tucker,* 364 U.S. 479 (1960).

The purpose and effect of the residence requirements are to drive settled poor aliens from the state. In *Yick Wo* v. *Hopkins, supra,* the Supreme Court held that when the effect and purpose of a San Francisco law was to discriminate against a class of individuals and deprive them of all means of living or any material right essential to the enjoyment of life it was unconstitutional. In *Thornhill* v. *Alabama,* 310 U.S. 88 (1941) a unanimous Supreme Court through Mr. Justice Murphy held that the mere existence of a statute which violated free speech rights infringed freedoms and created injury to society as well as individuals. These two cases establish that where the effect, purpose and nature of a statutory provision is to infringe constitutional rights, then it must be struck down.

In *Chy Lung* v. *Freeman,* 92 U.S. 275 (1875) a California law requiring a $500 bond for arriving foreigners to

[1] Limiting welfare expenditures alone is, of course, insufficient to sustain an otherwise invidious classification. *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); *Goldberg* v. *Kelly,* 397 U.S. 254 (1970).

indemnify all counties, towns, and cities against the possibility of having to support them was held invalid. The decision dealt mainly with the intent of obtaining money and international repercussions but concluded that such regulations must be justified by vital necessity and not carried beyond the "scope of the necessity." Just as California in 1875 was forbidden to demand money for fear of newcomers on relief rolls, so today states must be prevented from excluding and denying money for fear of aliens and aliens and newcomers on relief rolls.

Further, it is the intent of the statute to inhibit entrance into the state. In doing this, the statute seeks to inhibit the free movement of individuals. Freedom of movement is a highly regarded constitutional right, *Apthecker* v. *Secretary of State,* 378 U.S. 500 (1963). "Freedom of movement is basic in our scheme of values." *Griffin* v. *School Board,* 377 U.S. 218 (1964) (citing *Kent* v. *Dulles,* 357 U.S. 116 (1958) at 126). In *Zemel* v. *Rusk,* 381 U.S. 1, 15-16 (1965), a six man majority in the Supreme Court stated the scope and rationale of this principle:

> The right to travel *within* the United States is of course constitutionally protected, cf. *Edwards* v. *California,* 314 U.S. 160. But that freedom does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the areas would directly and materially interfere with the safety and welfare of the area or the Nation as a whole. So it is with international travel.

The flow of information was stated to be an important factor. (For the upholding of a standard quarantine law see *Baldwin* v. *Selig,* 298 U.S. 511 (1935).) The alien who

stays in the state creating a new environment, new contacts, new information for himself and family enters no area of pestilence and brings no diseases. See also *Edwards* v. *California*, 314 U.S. 160 (1941). The Court has held that the right to travel between states is a clear federal, constitutional right. *U. S.* v. *Guest*, 383 U.S. 745 (1965). To classify and exclude aliens who have traveled and settled goes counter to reason, is arbitrary, suspect by nature, and constitutionally infirm.

II.

The Arizona law by excluding certain resident aliens from public assistance benefits impermissibly penalizes resident aliens for the past exercise of their constitutional freedom to travel and, in seeking to drive them out, adversely affects freedom of association.

The class which is excluded is defined only by the fact of immigration by aliens sometime in the past 15 years. The freedom of travel is guaranteed under the Constitution. *U. S.* v. *Guest, supra; Kent* v. *Dulles*, 357 U.S. 116 (1958). To withhold benefits because of the results of the exercise of Constitutional freedom is forbidden. *Sherbert* v. *Verner*, 374 U.S. 398 (1964); *Shapiro* v. *Thompson, supra; Hamm* v. *Forssenius*, 380 U.S. 528 (1963).[2]

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[2] It should be mentioned in passing that this exclusion and resulting departures and lessened quantity of money affects interstate commerce. See, in general, *Edwards* v. *California*, 314 U.S. 116 (1941); *Wickard* v. *Filburn*, 317 U.S. 111 (1942); *Atlanta Motel* v. *U. S.*, 379 U.S. 241 (1964); *U. S.* v. *Hill*, 248 U.S. 420 (1919); *Katzenbach* v. *McLung*, 379 U.S. 294 (1964). If taxation on a foreign corporation, which might interrupt interstate commerce, is unconstitutional, see, e.g., *Ward* v. *Maryland*, 79 U.S. 418 (1870); *Toomer* v. *Vintsell*, 334 U.S. 385 (1948), then deprivation of money to aliens which might affect interstate commerce is suspect.

As discussed, *supra,* in Point I, the purpose of the exclusion is to drive people out of communities, but the right to residence in the place of one's choice applies to resident aliens as well as citizens. The Fourteenth Amendment guarantee "to any person" of due process and equal protection of law includes aliens. *Yick Wo* v. *Hopkins, supra.* "This has been decided so often that the point does not require argument." *Wong Wing* v. *U. S.,* 103 U.S. 228 (1895). Resident aliens, like all residents, are free to live in any state and no state may impose disabilities on them for the exercise of this basic right. *Chy Lung* v. *Freeman, supra; Henderson* v. *Mayor of New York,* 92 U.S. 259 (1875). The rationale for this is the freedom of association.

When an alien moves to a state he moves for many reasons. Some of these reasons are constitutionally sacred and therefore, incapable of infringement on the part of the government. One such basic freedom which motivates movement is the desire to associate in a new community with new people, to expose oneself to new ideas, new climate and new economic opportunity.

Freedom of association is a fundamental right. *McLaughlin* v. *Florida,* 379 U.S. 184 (1964) held a statute unconstitutional on grounds of unreasonable classification which made it a crime for Negroes and whites to associate in a hotel room emphasizing the constitutional right to choose whatever companions one wants in the place of association with them. So, too, should a state be prohibited from inhibiting an alien in his choice of associates and place of association for his life and family. In *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965) six members of this Court joined by two others held that a requirement that

an addressee request "propaganda" in writing from the post office department is unconstitutional. The government is forbidden from imposing requirements on the receipt of desired information. So, too, should a state be prohibited from actions which make it harder for an alien to continue to reside and interchange information. This court has held that prejudice and bad feelings against foreign nationals cannot stand in the way of their settling where they desire. *In Re Mitsuye Endo,* 323 U.S. 283 (1944). These cases establish that any government is prohibited from imposing conditions of any sort upon the persons with whom one desires to associate at the place of his choosing. This penalization of a past exercise of a constitutional right denies freedom of association while violating mandates of equal protection. It is, therefore, unconstitutional and invalid.

III.

The exclusive federal power to regulate aliens precludes state denial of public assistance based solely on lack of citizenship.

The regulation of aliens is invested in the federal government as part of its power over foreign commerce, to conduct foreign relations, to establish a uniform rule of naturalization and the inherent power of any national sovereign to control immigration. United States Constitution, Art. I, cl. 3. The federal power to exclude aliens is absolute. *Fong Yue Ting* v. *U. S.,* 149 U.S. 698, 705-07 (1893). State action pertaining to noncitizens, if not entirely restricted, is sharply limited:

> this legislation [Pennsylvania's Alien Registration Law] is in a field which affects international relations,

> the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits . . . *Hines* v. *Davidowitz,* 312 U.S. 52, 68 (1941).

Consistent with these guidelines Congress has laid down a comprehensive regulatory scheme which controls the admission, continued residence, and naturalization of aliens. Immigration and Nationality Act of 1952, as amended 8 U.S.C. Section 1101 *et seq.* Federal control over noncitizens does not abate at the time of entry. Resident aliens must notify the Attorney General of their addresses annually. 8 U.S.C. Section 1305. They may not be admitted to federal civil service competitive examinations, 5 U.S.C. Section 3301; 5 C.F.R. Section 338.101(a); yet male aliens admitted for permanent residence must serve in the armed forces. 50 U.S.C. App. Section 454(a). They may be deported after admission if at the time of entry they were excludable as "paupers, professional beggars, or vagrants," 8 U.S.C. Section 1182(a)(8), or were "likely at any time to become public charges." 8 U.S.C. Section 1182(a)(15); 8 U.S.C. §1251(a)(1). Most compelling is that lawfully admitted resident aliens face deportation if they "within five years after entry become a public charge from causes not affirmatively shown to have arisen after entry." 8 U.S.C. Section 1251(a)(8).

The federal scheme is continuing, comprehensive, and when dealing with restrictions placed on a noncitizen's ability to provide for his livelihood and to care for himself, exclusive. The federal penalty suffered by noncitizens who

become a public charge within five years after entry is deportation, unless they can show that the cause arose after entry. 8 U.S.C. Section 1251(a)(8). Arizona increases this penalty to denial of public assistance until fifteen years after entry. This is impermissible:

> where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, consistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations. *Hines* v. *Davidowitz, supra,* at 66-67.

Furthermore, the conflict between federal and state purposes is apparent because noncitizens are often helpless to alter their status so as to comply with Arizona's citizenship requirement. Naturalization requires at least three years, and for most noncitizens, five years continuous residence in the United States after lawful admission, and six months residence within the State in which petition for naturalization is filed. 8 U.S.C. Sections 1427(a), 1430. Arizona interferes markedly with this plan for naturalization. A lawfully admitted resident alien, otherwise eligible for public assistance, whose need results from circumstances developing after his entry, is completely barred from public assistance under any circumstance until he satisfies the federal citizenship residency requirement. When the emergency arises and he requires assistance, he is forced to emigrate from Arizona to seek assistance elsewhere, thereby *terminating* his federally required period of state residence for purposes of naturalization.

State statutes have been struck down on numerous occasions because they interfered with the accomplishment and execution of the objectives of federal regulation of aliens. *Takahashi* v. *Fish and Game Commission, supra; Hines* v. *Davidowitz, supra; Chy Lung* v. *Freeman, supra.* Recently, the California Supreme Court held that California's prohibition on public employment of aliens was invalid because it interfered with the comprehensive federal scheme enacted to regulate immigration. *Purdy and Fitzpatrick* v. *California, supra.* Certainly Arizona's complete exclusion of aliens from public assistance is more obnoxious to the federal scheme than the partial limitation on employment in California or the percentage limitation on employment overturned in *Truax* v. *Raich,* 239 U.S. 33 (1915).

It is enough that the statutes surrounding aliens "[t]aken as a whole . . . evince a congressional plan which makes it reasonable to determine that no room has been left for the States to supplement it." *Pennsylvania* v. *Nelson,* 350 U.S. 497, 504 (1956); *Warren Trading Post Co.* v. *Arizona Tax Commissioner,* 380 U.S. 685 (1965).

Furthermore, it is enough that a state law have some direct impact on foreign relations:

> Yet, even in absence of a treaty, a State's policy may disturb foreign relations . . . . Certainly a State could not deny admission to a traveler from East Germany nor bar its citizens from going there. [citations omitted] If there are to be such restraints, they must be provided by the Federal Government. The present Oregon law is not as gross an intrusion in the federal domain as those others might be. Yet, as we have said, it has a direct impact upon foreign relations and

> may well adversely affect the power of the central government to deal with these problems. *Zschernig* v. *Miller,* 389 U.S. 429, 441 (1968).

Arizona approaches this complete denial of admission to aliens by burdening their right to interstate travel through its exclusion of aliens from public assistance. Cf. *Shapiro* v. *Thompson, supra.* It would indeed be ironic, if not tragic, if the federal scheme of regulation of aliens were found insufficient to protect lawfully admitted resident aliens from discrimination by states in provision of their basic needs; while it protects the rights of foreign nationals residing in Communist countries to inherit property pursuant to state laws. *Zschernig* v. *Miller, supra.*

Moreover, even without a treaty it is easy to contemplate the direct impact on foreign relations of such discrimination against aliens. Foreign nations, some of whom provide even free medical care to United States travelers, must be disturbed by a United States which first welcomes foreign nationals to its shores, requiring them to undergo a rigorous admission procedure, and then inconsistently allows its states to arbitrarily deny them the means to survive. And Arizona's restriction is certain to interfere with the conduct of foreign relations because it expressly contravenes the principles of the *United Nations Charter,* 59 Stat. 1031, and the *Charter of the Organization of American States,* 2 UST 2394 (1951). One would be hard pressed, as a representative of the United States, either before a single foreign dignitary or at a meeting of the United Nations or Organization of American States, to justify or explain Arizona's restriction in light of the declared purpose of the United Nations to "develop

friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples," and the principles of the Organization of American States Charter whose "Member States agree upon the desirability of developing their social legislation on the following bases: a) All human beings, without distinction as to race, nationality, sex, creed or social condition, have the right to attain material well-being and spiritual growth under circumstances of liberty, dignity, equality of opportunity, and economic security." United Nations Charter, Chapter 1, Article 1, Subparagraph (2); Charter of the Organization of American States, Chapter VII, Article 29.

Congress has spoken. The Constitution is clear. Arizona may not penalize aliens in this field and in this way.

CONCLUSION

The Judgment of the District Court should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 609, 727

JOHN O. GRAHAM, Commissioner, Department of Public Welfare, State of Arizona,

Appellant,

—v.—

CARMEN RICHARDSON, for herself and all others similarly situated,

Appellees.

WILLIAM P. SAILER, *et al.*,

Appellants,

—v.—

ELSIE MARY JANE LEGER, BERYL JERVIS,

Appellees.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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Interest of *Amicus**

The American Civil Liberties Union is a nationwide non-partisan organization dedicated solely to the defense of the Bill of Rights. In its fifty-year existence, the ACLU

* Letters of consent to the filing of this brief, from all counsel in both cases, have been filed with the Clerk of the Court.

has been particularly concerned with the right of aliens to enjoy the full protection of our Constitution. The ACLU has participated in numerous cases in this and other courts to challenge deprivations imposed upon non-citizens. The Union is also deeply concerned with laws that impose invidious discriminations upon distinct classes in our society in violation of the guarantee of equal protection of the laws. Finally, the ACLU is committed to the principle that the right to travel shall be as unrestricted as possible.

This case involves the interrelationship of all three principles: the rights of aliens, the guarantee of equal protection and the right to travel. The proper application of these rights is of great importance to the ACLU.

Statement of Facts

Both cases at bar involve challenges to state laws that exclude persons from welfare benefits solely because of their status as aliens. In *Sailer* v. *Leger*, No. 727, the appellees are members of a class of lawfully admitted aliens residing within the Commonwealth of Pennsylvania who would otherwise be eligible for a form of public assistance known as general assistance but for the statutory provision that such general assistance is payable only to citizens of the United States.[1] A three-judge United States Dis-

[1] Pennsylvania has two major public assistance programs. One is known as categorical assistance, for which approximately half the funds are supplied by the federal government. Categorical assistance includes aid to the blind, aged, permanently and totally disabled and to families with dependent children. Aliens are fully eligible for categorical assistance. General assistance is designed to provide aid to persons who are not eligible for categorical assistance but are otherwise in need. This program is financed entirely with state funds and is limited to citizens of the United States. Pa. Pub. Wel. Code, Section 432(2).

trict Court held that the exclusion of aliens from the general assistance program was unconstitutional and enjoined the enforcement of that portion of the statute.

In *Graham* v. *Richardson,* No. 609, also instituted as a class action, appellee is a lawfully admitted alien who has resided in the State of Arizona continuously for thirteen years. At the time of the filing of the suit she would have been eligible for benefits under welfare programs providing for Aid to the Permanently and Totally Disabled or Old Age Assistance, but for the requirement of state law that the recipient of such benefits be a United States citizen or, if an alien, have resided in the United States for fifteen years. A three-judge United States District Court held that the fifteen year residency requirement for resident aliens was unconstitutional and granted injunctive and declaratory relief against its enforcement.

Summary of Argument

1. The denial of welfare benefits to aliens solely because of their status is inherently suspect, and the state bears a very heavy burden of justifying the discrimination. The alien's need for welfare benefits is no less than that of the citizen. To deny such benefits to him will not save welfare costs, even if this were a constitutionally permissible objective, which it is not. The discrimination cannot be justified on the ground that public funds are involved, since even if such funds constituted "state resources," a state may not constitutionally exclude aliens from the enjoyment of such resources. The exclusion of aliens from welfare benefits constitutes invidious discrimination, which can in no way be justified and, therefore, falls within the

Fourteenth Amendment's prohibition against the denial of equal protection of the laws.

2. The denial of welfare benefits to aliens by a state inhibits aliens from taking up residence in that state and serves to penalize those aliens who have already chosen to live there. Aliens, as well as citizens, have the constitutional right to travel within the United States. State laws that operate to restrict or discourage interstate travel are unconstitutional, and the state may not allocate welfare benefits in a manner that has this effect.

3. A state's power to act upon aliens as a class is restricted to the narrowest of limits. State laws which impose discriminatory burdens upon the entrance or residence of aliens conflict with the power of Congress to regulate immigration, and for that reason are invalid. Under federal law an alien has the right to remain in this country notwithstanding that he becomes indigent due to circumstances arising after his admission, and under federal law aliens are entitled to the "full and equal benefits of state laws." The state laws in question discriminate against aliens because of their status and deny welfare benefits to them although the need for such benefits may be due to causes arising after the alien has been admitted. There is a clear conflict between state and federal law, and the inconsistent provisions of state law must yield.

ARGUMENT

I.

The denial of welfare benefits to indigent residents of a state solely on the ground that they are aliens or on the ground that they have not satisfied a residency requirement which is not applicable to citizens constitutes invidious discrimination and deprives such persons of equal protection of the laws.

In both cases welfare benefits have been denied solely because the recipient was an alien. Both states have established two categories of indigent residents, citizens and aliens, and distinguish between eligibility for the benefits solely on that basis. It has long been settled that discrimination against aliens, like discrimination on the basis of race, color or nationality is inherently suspect. *Takahashi* v. *Fish & Game Commission,* 334 U.S. 410, 420 (1948); *Oyama* v. *California,* 332 U.S. 633, 640 (1948). It is, therefore, subject to strict judicial scrutiny, with the state bearing a very heavy burden of justification. *Takahashi* v. *Fish & Game Commission, supra.* Since the benefits have been denied on a basis that is inherently suspect, the state must bear that burden, and it cannot rely on the "reasonable basis for the distinction" test. *Dandridge* v. *Williams,* 397 U.S. 471, 485 note 17 (1970).

This nation has not readily countenanced discrimination against resident aliens. Once an alien lawfully enters and resides in this country, "He becomes invested with the rights, *except those incidental to citizenship* guaranteed to all persons within our borders." *Eisler* v. *United States,*

170 F.2d 273, 279 (D.C. Cir., 1948) (emphasis added). The power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits. *Takahashi* v. *Fish & Game Commission, supra,* 334 U.S. at 420. As early as 1915 this Court invalidated a state law which required discrimination against aliens in private employment, *Truax* v. *Raich,* 239 U.S. 33 (1915), and as has been observed, "The courts stand ready to safeguard aliens against unreasonable discriminations." *Nielsen* v. *Secretary of the Treasury,* 424 F.2d 833, 846 (D.C. Cir., 1970).

In light of the above principles, what possible justification can there be for a state's denying welfare benefits to an indigent resident solely because he is an alien? His need for the benefit is certainly no less than the need of the citizen. *Truax* v. *Raich, supra.* As this Court has observed: "Welfare, by meeting the basic demands of subsistence can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community." *Goldberg* v. *Kelly,* 397 U.S. 254, 265 (1970). These benefits are a matter of statutory entitlement, more akin to property than to a "gratuity." *Goldberg* v. *Kelly, supra,* 397 U.S. at 262, note 8. Since the alien's need for the benefit is no less than the citizen's, he is presumptively entitled to it, and it may not be denied solely because of his status. *Sherbert* v. *Verner,* 374 U.S. 398 (1963).

In today's society the denial of welfare benefits to aliens is no different from the denial of employment opportunity that was invalidated in *Truax* v. *Raich, supra.* Welfare benefits, generally speaking, represent interim assistance to those who are temporarily unable to find work, or represent the substitute for the income that would be obtained

from employment if it were not for the disability that makes employment impossible. If a state may not deny the alien the right to work, it may not, when it has made welfare benefits available to meet the needs that otherwise would be met from employment income, deny those benefits to the alien lawfully resident there.

The states may contend that denying aliens welfare benefits reduces the total cost of the welfare program. The short answer to that contention is that the saving of welfare costs cannot justify an otherwise invidious discrimination. *Shapiro* v. *Thompson,* 394 U.S. 618, 633 (1969).[2] Moreover, no real savings are involved, because the number of aliens seeking public assistance is infinitesimal. The present restrictive immigration policy of Congress sharply limits the number of aliens that are admitted, and they are not concentrated in any single state. As the Court below pointed out in *Sailer* v. *Leger,* alien applicants for general assistance in Pennsylvania are less than 100 a year; some 85,000 people are on general assistance. In Arizona some 21 aliens applied for public assistance during the last fiscal year. Even if it were permissible for a state to exclude aliens from welfare benefits in order to achieve economies, such exclusion does not have that effect. The present cases, therefore, are in no way remotely similar to *Dandridge* v. *Williams, supra,* where the Court found that there was a rational basis for the maximum grant limitation, other than conservation of funds, namely the avoidance of discrimi-

[2] In *Shapiro* this Court referred to "invidious distinctions between classes of citizens". 394 U.S. at 633. Since the Court has previously characterized distinctions between citizens and aliens as "invidious," it cannot be contended that the reference to "citizens" implies that distinctions between citizens and aliens are no longer "invidious."

nation between welfare families and the families of the working poor. The denial of welfare benefits to aliens represents discrimination for discrimination's sake and is patently unjustifiable.

Nor can the discrimination be in any way justified on the ground that public funds are involved. It is true that earlier cases have held that it was permissible for states to discriminate against aliens with respect to governmental employment. *Heim* v. *McCall,* 239 U.S. 175 (1915); *Crane* v. *New York,* 239 U.S. 195 (1915). These cases, however, were not based so much on the premise that it was reasonable for a state to bar aliens from public employment as on the view that a state was free to be as arbitrary as it wished in distributing the "privilege" of public employment. See the discussion in *Heim* v. *McCall,* 239 U.S. at 191. The notion that public employment is a "privilege" which the states can condition without limitation has been firmly repudiated by this Court in case after case. See e.g., *Wieman* v. *Updegraff,* 344 U.S. 183 (1952); *Shelton* v. *Tucker,* 364 U.S. 479 (1960); *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967). Similarly, it has been rejected as applied to federal employment. See e.g., *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947). The exclusion of aliens from all public employment, therefore, is inconsistent both with contemporary acceptance of the notion that constitutional standards do inhibit governmental power over public employment and with more recent expositions by this Court of the rights of aliens, as in *Takahashi* v. *Fish & Game Commission, supra.* Thus the Supreme Court of California *en banc* has recently held that the California statute prohibiting the employment of aliens on public works was violative of the Fourteenth Amendment. *Purdy & Fitzpatrick*

v. *State of California,* 79 Cal. Rptr. 77, 456 P.2d 645 (1969). See also *Department of Labor* v. *Cruz,* 45 N.J. 372, 212 A.2d 545 (1965). "Privilege-right" distinctions used many years ago to uphold the exclusion of anyone from public employment cannot be used today to justify the denial of welfare benefits—which are not a "privilege" by any stretch of the imagination, *Goldberg* v. *Kelly, supra*—or indeed of any benefits, to people simply because they are aliens. *Sherbert* v. *Verner, supra.*

Nor can it be contended that welfare benefits are a "state resource" from which aliens can be excluded. Denial of welfare benefits simply saves funds, not natural resources, and the saving of welfare costs cannot justify an otherwise invidious discrimination. *Shapiro* v. *Thompson, supra.* Moreover, it is now clear that the state cannot exclude aliens from the enjoyment of state resources such as fisheries, *Takahashi* v. *Fish & Game Commission, supra,* or land. *Sei Fujii* v. *State,* 38 Cal.2d 718, 242 P.2d 617 (1952). Cf. *Oyama* v. *California,* 332 U.S. 633 (1948). *A fortiori,* it cannot, on that basis, exclude them from welfare benefits. Nor can it do so on the ground that it is entitled to favor its own citizens in the disbursement of public funds. As the California Supreme Court observed in *Purdy*:

> ". . . [s]ince aliens support the State of California with their tax dollars, any preference in the disbursement of public funds which excludes aliens appears manifestly unfair. . . . [a]ny classification which treats all aliens as undeserving and all United States citizens as deserving rests upon a very questionable basis. The citizen may be a newcomer to the state who has little 'stake' in the community; the alien may be a resident who has lived in California for a lengthy

> period, paid taxes, served in our armed forces, demonstrated his worth as a constructive human being, and contributed much to the growth and development of the state." 456 P.2d at 656.

The equal protection clause forbids such invidious distinctions in the disbursement of public funds.

If the exclusion of aliens from welfare benefits is unconstitutionally discriminatory, it does not become constitutional by virtue of the fact that it may have been approved by the appropriate federal administrative agency. It is questionable whether statutory provisions such as 42 U.S.C. §302(b), which prohibit the Secretary of Health, Education and Welfare from approving any plan which excludes any citizen impliedly authorizes the states to exclude aliens. See the discussion of the analogous provision of §402(b) with respect to residency as a requirement for the receipt of Aid to Dependent Children Benefits in *Shapiro* v. *Thompson, supra,* 394 U.S. at 639-40. In any event, as in *Shapiro,* it is the responsive state legislation which infringes the constitutional rights of aliens, and certainly Congress may not authorize the states to violate the equal protection clause. 394 U.S. at 641.

When all is said and done, there is no basis whatsoever for the denial of benefits to indigent alien residents of a state except that of invidious discrimination. No real economies result to the state from such exclusion even if this were a constitutionally permissible justification. The need of the alien for the benefit is no less than that of the citizen, and he is not by virtue of his status, any less worthy a recipient. The welfare benefits are denied solely on the basis of his status, which is inherently suspect to begin

with, and no reasonable basis, let alone compelling justification, can be shown for the discrimination. Therefore, it comes clearly within the scope of the Fourteenth Amendment's prohibition against the denial of equal protection of the laws.

II.

The denial of welfare benefits to persons solely because they are aliens unreasonably burdens the right of aliens to travel within the United States and to settle in any of the several states.

The denial of welfare benefits to aliens by a state necessarily inhibits aliens from taking up residence in that state and serves to penalize those aliens who have already chosen to live there. In *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), this Court held that a one year residency requirement as a condition of eligibility for welfare benefits violated the constitutional guarantee of freedom to travel. It observed that, "An indigent who desires to migrate, resettle, find a new job and start a new life will doubtless hesitate if he knows that he must risk making the move without the possibility of falling back on state welfare assistance during his first year of residence when his need may be most acute." 394 U.S. at 629.

The inhibiting effect of Pennsylvania and Arizona's exclusionary rule upon resident aliens is even greater. The alien knows that if he goes to Pennsylvania and subsequently becomes destitute he can never obtain general assistance benefits; if he goes to Arizona, he cannot obtain any public assistance benefits until he has resided in the United States for fifteen years. Today it is reasonable for

people to assume that they will be able to receive public assistance benefits in case of need, and in the great majority of states aliens are entitled to such benefits. If some states exclude aliens from these benefits, it is clear that aliens may be discouraged from taking up residence there. And those who have already done so are being prejudiced for precisely that reason. As *Shapiro* makes clear, a state may not violate the constitutional right to travel by laws that discourage movement into that state. The right to travel should be deemed to have been infringed whenever the effect of a state law is to "impede or prevent the exercise of that right." Cf. *United States* v. *Guest*, 383 U.S. 745, 760 (1966). A law that denies welfare benefits to aliens as a class clearly has the effect of discouraging their movement into a state and penalizing those who have already chosen to come there, and thus violates the constitutional right to travel.

There is another perspective from which the statutes in question infringe the fundamental right to travel. Not only do these laws deter travel by aliens into the state, but they also penalize continued residence there by an alien who subsequently requires public assistance. A corollary of the right to travel among the states is the right to secure an abode and not be coerced into emigration. See, *Truax* v. *Raich*, 239 U.S. 33, 42 (1915); cf. *Ex Parte Endo*, 323 U.S. 283 (1944). Yet, the statutes here not only discourage aliens' entrance into the state, they compel exodus from the state. Indeed, in No. 727, it was stipulated:

> 2. That the citizenship bar to the receipt of General Assistance in Pennsylvania discourages continued residence in Pennsylvania of indigent resident aliens and

causes such needy persons to remove to other States which will meet their needs (A. 23a).

Such a purpose is no different than that of a statute which required aliens who became indigent to depart the state. Not only is such a purpose inconsistent with the right to travel, but it infringes First Amendment rights of association by forcing the indigent alien to uproot himself and abandon the network of personal relationships he has acquired. No state interests have been advanced to justify such extraordinary results. It is thus apparent that the right to travel is infringed by these statutes.

Nor can it be claimed that aliens are excluded from the protections of the right to travel, for there can be no doubt that this right extends to aliens as well as citizens. This was clearly recognized in *Truax* v. *Rauch, supra,* where this Court held that a state could not deny aliens "entrance and abode." 239 U.S. at 42. Cf. *Edwards* v. *California,* 314 U.S. 160 (1941). In *Shapiro* v. *Thompson, supra,* the right to travel from state to state was found to be so fundamental as to constitute a basic generic right under the Constitution,

"We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision. It suffices that, as Mr. Justice Stewart said for the Court in United States v. Guest, 383 U.S. 745, 757-758, 16 L Ed 2d 239, 249, 86 S Ct 1170 (1966):

'The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.

> '. . . [The] right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.'" (Footnote omitted.) 394 U.S. at 630-31.

Justice Stewart, concurring, noted that the right to travel is a "virtually unconditional personal right guaranteed by the Constitution to us all.", 394 U.S. at 643 (footnote omitted). At the very least, the right is generally a liberty within the meaning of the due process clauses of the Fifth and Fourteenth Amendments, *Kent* v. *Dulles,* 357 U.S. 116, 125 (1958), which is applicable to aliens as well as citizens. *Yick Wo Ho* v. *Hopkins,* 118 U.S. 356, 369 (1886); *Galvan* v. *Press,* 347 U.S. 522 (1954).

Moreover, the Fourteenth Amendment embodies a general policy that all persons lawfully in this country may abide "in any state on an equality of legal privileges with all citizens." *Takahashi* v. *Fish & Game Commission,* 334 U.S. 415, 420 (1948). Since citizens have a constitutional right to travel into any state, *Shapiro* v. *Thompson, supra,* there is no basis for believing that the same "basic right under the Constitution" does not extend to aliens. Any reference to "citizens" in *Shapiro* v. *Thompson, supra,* must be understood in this context. There can be no implication from the reference to "citizens" in *Shapiro* that aliens do not have the same right to travel within the United States and from one state to another. *Truax* v.

Raich, supra. As Justice Harlan concluded in dissent, "... the right to travel interstate is a 'fundamental' right which, for present purposes, should be regarded as having its source in the Due Process Clause of the Fifth Amendment." *Shapiro* v. *Thompson, supra* at 671. The protection of the due process clauses extends to "persons," not just to citizens.

Since the constitutional right to travel extends to aliens, it follows that a state may not so act as to put restraints upon the exercise of that right. In *Truax* v. *Raich, supra,* the Court, after observing that a state could not directly deny aliens the right of entrance and abode, pointed out that it could not achieve the same result indirectly by denying them the opportunity of earning a livelihood, "for in ordinary cases they cannot live where they cannot work." It went on to say:

> "And if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality." 239 U.S. at 42.

Likewise, in today's world, the state cannot achieve the result of exclusion indirectly by denying aliens welfare benefits when they are unable to sustain themselves through employment.

If aliens have the same constitutional right to travel within the United States and to take up their abode in any state, as do citizens, a state cannot impose inhibitions upon the exercise of that right by denying to aliens who

settle there welfare benefits that are afforded to citizens. All who choose to settle within a state, precisely because they have the right to make that choice, are entitled to receive the welfare benefits that the state provides. *Shapiro* v. *Thompson, supra.*

III.

The denial of welfare benefits on the part of a state to resident aliens is inconsistent with the exercise of federal power in the area of immigration and naturalization and is, therefore, pre-empted by supreme federal law.

Pursuant to its power to "establish a uniform rule of naturalization" under Article I, §8(4) of the Constitution, Congress has enacted a comprehensive scheme of legislation dealing with the immigration, naturalization and regulation of aliens. The power of Congress in this field is supreme and exclusive. As this Court has stated:

> "The federal government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization .... Under the Constitution the States are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States." *Takahashi* v. *Fish & Game Commission,* 334 U.S. 410, 419 (1948).

Any concurrent state power over aliens that may exist is restricted to the narrowest of limits. *Hines* v. *Davido-*

witz, 312 U.S. 52, 66 (1941); *Takahashi* v. *Fish & Game Commission, supra,* 334 U.S. at 420.

One of the reasons for this broad grant of power to the federal government is the fear that states will discriminate against aliens precisely because they are aliens. As this Court has observed in a related vein, "Opposition to laws singling out aliens as particularly dangerous and undesirable groups is deep-seated in this country." *Hines* v. *Davidowitz, supra,* 312 U.S. at 70. In this regard there is an important relationship between the rights of the alien and the foreign affairs power of the federal government. As pointed out in *Hines* v. *Davidowitz, supra,* "both treaties and international practices have been aimed at preventing injurious discriminations against aliens," 312 U.S. at 65, and "Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects, inflicted, or permitted by a government." 312 U.S. at 64. Thus, there is a *national interest* in insuring equal treatment among all aliens irrespective of where they happen to reside.[3] State laws that single out aliens for discriminatory treatment play havoc with this national interest.

In determining whether a state law affecting aliens is pre-empted by federal law the test is whether the law "stands as an obstacle to the accomplishment and execu-

[3] In the recently-decided case of *In re Mortyr,* —— F. Supp. —— (D. Ore. 1970), 39 Law Week 2261, it was held that an alien could not be deemed of "bad moral character" because she had entered into a common-law marriage which was illegal in Oregon, where she resided, since other states recognized such marriages. The Court stated: "In the interest of uniformity in the application of federal immigration and naturalization law, petitioner should be granted that status wherever she makes her home."

tion of the full purposes and objectives of Congress." *Hines* v. *Davidowitz, supra,* 312 U.S. at 67. It is undisputed that state laws which "impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with the constitutionally-derived federal power to regulate immigration and accordingly have been held invalid." *Takahashi* v. *Fish & Game Commission, supra,* 334 U.S. at 419. The provisions of 42 U.S.C. §1981 guaranteeing to all persons within a state "the full and equal benefit of all laws" extend to aliens, and protect them from state legislation bearing unequally upon them because of their alienage. *Takahashi* v. *Fish & Game Commission, supra,* 334 U.S. at 419-20. In this regard the denial of welfare benefits has the same effect as deprivation of the right to employment, condemned in *Truax* v. *Raich,* 239 U.S. 33 (1915), for here too, "Those lawfully admitted to the country under the authority of acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission would be segregated in such of the States as chose to offer hospitality." 239 U.S. at 42.

In no sense is the conflict between the exercise of state and federal power here vitiated by the fact that under federal law *admission* to the country can be denied to an alien who is a pauper or who is likely to become a public charge, 8 U.S.C. §1182(a)(8), (15), and that an alien who becomes a public charge within five years after entry from causes not affirmatively shown to have arisen after entry may be deported. 8 U.S.C. §1251(a)(8). Quite to the contrary, the provisions of federal law clearly demonstrate how the state laws in question "stand as an obstacle to

the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz, supra.* The intent of Congress was to exclude from admission aliens who were indigent at that time or likely to become indigent because of conditions existing then. As is particularly indicated by the provisions of 8 U.S.C. §1251 (a)(8), if the causes of the indigency arose subsequent to the time of admission, the alien is not considered undesirable, and under federal law is not deportable notwithstanding that he is receiving public assistance. *Foley* v. *Ward,* 13 F. Supp. 915 (D. Mass. 1936). See generally Gordon & Rosenfield, *Immigration Law and Procedure* 4-143 (1970).

Thus, the intent of Congress was that an alien was excludable or deportable only if indigency or the likelihood of same existed at the time of entry. The provisions of 8 U.S.C. §241 and 42 U.S.C. §1981 demonstrate that the alien, wherever he resides, is entitled to public welfare benefits in the same manner as citizens. Taking the statutes together, the congressional scheme envisions the denial of admission to or the deportation of an alien who was indigent or who was likely to become indigent at the time of admission, but that if his indigency was due to factors arising after indigency, he is not only not deportable, but is entitled to the welfare benefits afforded citizens. Pennsylvania and Arizona deny welfare benefits to aliens, such as the present appellees, who became indigent *after* their admission into the country. Where the federal government has enacted a complete scheme of regulation of aliens and has provided a federal standard, "States cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal

law or enforce additional or auxiliary regulations." *Hines* v. *Davidowitz, supra,* 312 U.S. at 66. The provisions of Arizona and Pennsylvania law excluding resident aliens from welfare benefits when the cause of their indigency arose after their admission to the country do just that and "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." As such they are violative of Article VI, §2 of the Constitution and cannot stand.[4]

[4] This does not mean that they would be valid even if they were consistent with the congressional classification, *e.g.,* if Congress provided for the deportation of aliens who became indigent following their admission into the country. The fact that Congress in implementing national policy has chosen to classify aliens in certain ways does not mean that it is permissible for the states to classify them in the same way. See the discussion in *Takahashi* v. *Fish & Game Commission, supra,* 334 U.S. at 420. If aliens were deportable because of post-admission indigency, it is for the appropriate federal authority to effect the deportation. So long as that authority has not chosen to act, aliens would still be entitled to the same rights as citizens under 18 U.S.C. §241 and 42 U.S.C. §1981, and, of course, would still be entitled to be free from invidious discrimination.

CONCLUSION

The provisions of Arizona and Pennsylvania law excluding resident aliens from welfare benefits solely because of their status deprive such persons of equal protection of the laws, violate their constitutional right to travel and conflict with the exercise of federal power in the area of immigration and naturalization. The decisions of the lower courts were manifestly correct and should be affirmed.

Respectfully submitted,

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March, 1971

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1970

NO. 609

JOHN O. GRAHAM, Commissioner,
Department of Public Welfare,
State of Arizona,

Appellant,

versus

CARMEN RICHARDSON, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ARIZONA

APPELLANT'S REPLY BRIEF

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POINT I

APPELLEES MAY NOT RAISE A NEW ISSUE TO SUSTAIN THE LOWER COURT'S DECISION NOT PRESENTED TO OR CONSIDERED BY THE LOWER COURT

Appellees present a new theory to sustain the Lower Court's decision by relying upon the Charter of the Organization of American States, 2 U.S.T. 2394, and the United Nations Charter, 59 Stat. 1031. The record of the Court below clearly indicates the Appellees did not raise the invalidity of the statutes in question as being in violation of or contrary to the foregoing Treaties of the United States Government.[1/] This

1/See Appellees' First Amended Complaint, A. pp.5-9; Appellees' Motion for Summary Judgment and Memoranda, A. pp.13-24 & 35-43; the Opinion and Order, A. pp.44-48; and Reporter's Transcript of Proceedings of February 27, 1970, R. item 25.

Court has refused to entertain on appeal issues not properly raised in the Lower Court. Walters v. City of St. Louis, 347 U.S. 231 (1954); Yakus v. United States, 321 U.S. 414 (1944); Herndon v. Georgia, 295 U.S. 441 (1935).

Assuming the above mentioned treaties are applicable to this case, they cannot be interpreted by this Court to strike down Arizona's legislative policy for the reason public assistance has never been construed to be a fundamental right. In Wyman v. James, October Term 1970, No. 69, decided January 12, 1971, ___ U.S. ___, Mr. Justice Blackman characterized public assistance as public charity.

> "One who dispenses purely private charity naturally has an interest in and expects to know how his

> charitable funds are utilized and put to work. The public, when it is the provider, rightly expects the same."

This Court should not implement the proposed foreign policy of the Appellees by its decisions. This is a matter for the Congress to perform by positive legislative enactment under the power granted to it by the Constitution. United States Constitution, Article I. Furthermore, Appellees exhibit great concern over what they construe to be America's treaty obligation and feel that allowing Arizona to continue enforcing its national residence requirement "would make mockery of the United States in the eyes of other nations." The flaw in such a position is that public assist-

ance is not the touchstone of this country's governmental institutions or the criteria by which its foreign policy should be measured.

POINT II

ARIZONA'S ALIEN RESTRICTIONS DO NOT VIOLATE 42 U.S.C. § 2000(d)

The statutes in question do not violate 42 U.S.C. § 2000(d) for the reason they apply equally to all persons notwithstanding their national origin. This situation is analagous to the case of Lassiter v. Northampton County Board of Election, 360 U.S. 45 (1959) where this Court upheld North Carolina's literacy test since it was applied equally to all races. Equal treatment is not a violation of equal protection.

POINT III

ARIZONA'S CITIZENSHIP REQUIREMENTS DO NOT VIOLATE EQUAL PROTECTION, DUE PROCESS, OR ANY OTHER PROVISION OF THE UNITED STATES CONSTITUTION

Appellees conclude that the existence of a fifteen (15) year durational residency requirement conflicts with federal law and unconstitutionally denies indigent aliens entrance to Arizona. However, Appellees do not set forth any reasons why the durational residency requirement for aliens operates in this manner. Arizona restricts no one from entering or abiding in the United States or the State. Nor does the law impede their free movement or job opportunities. It merely imposes a national residency requirement which operates after entry and thus has no effect on immigration.

The hypothetical results complained of can only occur by a restriction on admission or a denial of rights after entrance. There is clearly no restriction on entering the State. The national residency provision has no effect on the post-entry requirement or the opportunity for residing or earning a living within the State.

Decisions of this Court that constitutionally permit prohibiting of aliens from certain public works surely must be precedent to permit the favoring of citizens over aliens in the dispensation of welfare benefits. Heim v. McCall, 239 U.S. 175 (1915); Crane v. New York, 239 U.S. 195 (1915). A state has the power to exclude from enjoyment of its re-

sources those who are unwilling or unable to become citizens. Terrace v. Thompson, 263 U.S. 197 (1923); Patsone v. Pennsylvania, 232 U.S. 138 (1914); Truax v. Raich, 239 U.S. 33 (1915). Unless this Court is prepared to overrule a long line of cases which established the special state interest doctrine, the statutes at bar must stand. Even the case of Takahashi v. Fish & Game Commission, 334 U.S. 410 (1948) recognized this doctrine but the Court found no "special state interest" of the State of California in conserving the fish off its coast. In the case at bar, Appellees do not contest this doctrine recognizing that the State of Arizona does have a very important interest in allocating its

limited resources as determined by its people to care and feed its needy citizens.

The Federal Government has never pursued a policy of equal treatment of aliens and citizens.2/ As pointed out in Appellant's Brief, citizens have rights superior to those of aliens in the ownership of land and in utilization of natural resources. No doubt Congress as a matter of immigration policy could place aliens on a parity with citizens, but until Congress speaks the judiciary must respect its "silence."

2/The United States limits the rights of aliens as compared to citizens in the following areas: Land ownership in its territories, 48 U.S.C. §§ 1501-1508; in employment, 5 U.S.C. § 3301; in disposition of mineral lands, 30 U.S.C. § 181; of public lands, 43 U.S.C. § 161; and in engaging in coastwise trade, 46 U.S.C. §§ 11, 13.

CONCLUSION

The law is clear. The decision below should be reversed and the permanent injunction vacated. Appellant's motion for summary judgment should be granted and the complaint should be dismissed.

March, 1971

Respectfully submitted,

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GRAHAM, COMMISSIONER, DEPARTMENT OF PUBLIC WELFARE OF ARIZONA *v.* RICHARDSON ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. 609. Argued March 22, 1971—Decided June 14, 1971*

State statutes, like the Arizona and Pennsylvania statutes here involved, that deny welfare benefits to resident aliens or to aliens who have not resided in the United States for a specified number of years are violative of the Equal Protection Clause and encroach upon the exclusive federal power over the entrance and residence of aliens; and there is no authorization for Arizona's 15-year durational residency requirement in § 1402 (b) of the Social Security Act. Pp. 5–18.

313 F. Supp. 34 and 321 F. Supp. 250, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, DOUGLAS, BRENNAN, STEWART, WHITE, and MARSHALL, JJ., joined. HARLAN, J., filed a statement joining in the judgment and in Parts III and IV of the Court's opinion.

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*Together with No. 727, *Sailer et al.* v. *Leger et al.*, on appeal from the United States District Court for the Eastern District of Pennsylvania.

SUPREME COURT OF THE UNITED STATES

Nos. 609 AND 727.—OCTOBER TERM, 1970

John O. Graham, Commissioner, Department of Public Welfare, State of Arizona, Appellant, 609 v. Carmen Richardson, Etc.	On Appeal From the United States District Court for the District of Arizona.
William P. Sailer et al., Appellants, 727 v. Elsie Mary Jane Leger and Beryl Jervis.	On Appeal From the United States District Court for the Eastern District of Pennsylvania.

[June 14, 1971]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

These are welfare cases. They provide yet another aspect of the widening litigation in this area.[1] The issue here is whether the Equal Protection Clause of the Fourteenth Amendment prevents a State from conditioning welfare benefits either (a) upon the beneficiary's possession of United States citizenship, or (b) if the beneficiary is an alien, upon his having resided in this country for a specified number of years. The facts are not in dispute.

[1] See, for example, *King* v. *Smith*, 392 U. S. 309 (1968); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969); *Goldberg* v. *Kelly*, 397 U. S. 254 (1970); *Rosado* v. *Wyman*, 397 U. S. 397 (1970); *Dandridge* v. *Williams*, 397 U. S. 471 (1970); *Wyman* v. *James*, 400 U. S. 309 (1971).

I

No. 609. This case, from Arizona, concerns the State's participation in federal categorical assistance programs. These programs originate with the Social Security Act of 1935, as amended, 42 U. S. C. c. 7. They are supported in part by federal grants-in-aid and are administered by the States under federal guidelines. Arizona Rev. Stat. Title 46, Article 2, as amended, provides for assistance to persons permanently and totally disabled (APTD). See 42 U. S. C. §§ 1351–1355. Ariz. Rev. Stat. § 46–233 reads:

> "A. No person shall be eligible for general assistance who does not meet and maintain the following requirements:
>
> "1. Is a citizen of the United States, or has resided in the United States a total of fifteen years . . . ."

A like eligibility provision conditioned upon citizenship or durational residence appears in § 46–252.2, providing old age assistance, and in § 46–272.4, providing assistance to the needy blind. See 42 U. S. C. §§ 1201–1206, 1381–1385.

Appellee Carmen Richardson, at the institution of this suit in July 1969, was 64 years of age. She is a lawfully admitted resident alien. She emigrated from Mexico in 1956 and since then has resided continuously in Arizona. She became permanently and totally disabled. She also met all other requirements for eligibility for APTD benefits except the 15-year residency specified for aliens by § 46-233.A.1. She applied for benefits but was denied relief solely because of the residency provision.

Mrs. Richardson instituted her class action [2] in the District of Arizona against the Commissioner of the

[2] The suit is brought on behalf of appellee and similarly situated Arizona resident aliens who, but for their inability to meet the

State's Department of Public Welfare seeking declaratory relief, an injunction against the enforcement of §§ 46–233.A.1, 46–252.2 and 46–272.4, and the award of amounts allegedly due. She claimed that Arizona's alien residency requirements violate the Equal Protection Clause and the constitutional right to travel; that they conflict with the Social Security Act and are thus overborne by the Supremacy Clause; and that the regulation of aliens has been preempted by Congress.

The three-judge court upheld Mrs. Richardson's motion for summary judgment on equal protection grounds. *Richardson* v. *Graham*, 313 F. Supp. 34 (Ariz. 1970). It did so in reliance on this Court's opinions in *Takahashi* v. *Fish & Game Commission*, 334 U. S. 410 (1948), and *Shapiro* v. *Thompson*, 394 U. S. 618 (1969). The Commissioner appealed. The judgment was stayed as to all parties plaintiff other than Mrs. Richardson. Probable jurisdiction was noted. 400 U. S. 956 (1970).

No. 727. This case, from Pennsylvania, concerns that portion of a general assistance program that is not federally supported. The relevant statute is § 432 (2) of the Pennsylvania Public Welfare Code, 62 P. S. § 432 (2) (1968),[3] originally enacted in 1939. It provides that those eligible for assistance shall be (1) needy persons who qualify under the federally supported categorical

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Arizona residence requirement, are eligibile to receive welfare benefits under state-administered federal categorical assistance programs for the permanently and totally disabled, the aged, and the blind.

[3] "§ 432. Eligibility

"Except as hereinafter otherwise provided . . . needy persons of the classes defined in clauses (1) and (2) of this section shall be eligible for assistance:

"(1) Persons for whose assistance Federal financial participation is available to the Commonwealth . . . .

"(2) Other persons who are citizens of the United States, or who, during the period January 1, 1938 to December 31, 1939, filed their declaration of intention to become citizens. . . ."

assistance programs and (2) those other needy persons who are citizens of the United States. Assistance to the latter group is funded wholly by the Commonwealth.

Appellee Elsie Mary Jane Leger is a lawfully admitted resident alien. She was born in Scotland in 1937. She came to this country in 1965 at the age of 28 under contract for domestic service with a family in Havertown. She has resided continuously in Pennsylvania since then and has been a taxpaying resident of the Commonwealth. In 1967 she left her domestic employment to accept more remunerative work in Philadelphia. She entered into a common-law marriage with a United States citizen. In 1969 illness forced both Mrs. Leger and her husband to give up their employment. They applied for public assistance. Each was ineligible under the federal programs. Mr. Leger, however, qualified for aid under the state program. Aid to Mrs. Leger was denied because of her alienage. The monthly grant to Mr. Leger was less than the amount determined by both federal and Pennsylvania authorities as necessary for a minimum standard of living in Philadelphia for a family of two.

Mrs. Leger instituted her class action [4] in the Eastern District of Pennsylvania against the Executive Director of the Philadelphia County Board of Assistance and the Secretary of the Commonwealth's Department of Public Welfare. She sought declaratory relief, an injunction against the enforcement of the restriction of § 432 (2), and the ordering of back payments wrongfully withheld. She obtained a temporary restraining order preventing the defendants from continuing to deny her assistance. She then began to receive, and still receives, with her husband, a public assistance grant.

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[4] It was stipulated that the class of persons the appellees represent approximates 65 to 70 cases annually. This figure stands in striking contrast to the 585,000 persons in the Commonwealth on categorical assistance and 8,500 on general assistance. Department of Public Welfare Report of Public Assistance, December 31, 1969.

Appellee Beryl Jervis was added as a party plaintiff to the Leger action. She was born in Panama in 1912 and is a citizen of that country. In March 1968, at the age of 55, she came to the United States to undertake domestic work under contract in Philadelphia. She has resided continuously in Pennsylvania since then and has been a taxpaying resident of the Commonwealth. After working as a domestic for approximately one year, she obtained other more remunerative work in the city. In February 1970 illness forced her to give up her employment. She applied for aid. However, she was ineligibile for benefits under the federally assisted programs and she was denied general assistance solely because of her alienage. Her motion for immediate relief through a temporary restraining order was denied.

It was stipulated that "the denial of General Assistance to aliens otherwise eligible for such assistance causes undue hardship to them by depriving them of the means to secure the necessities of life, including food, clothing and shelter," and that "the citizenship bar to the receipt of General Assistance in Pennsylvania discourages continued residence in Pennsylvania of indigent resident aliens and causes such needy persons to remove to other States which will meet their needs."

The three-judge court, one judge dissenting, ruled that § 432 (2) was violative of the Equal Protection Clause and enjoined its further enforcement. *Leger* v. *Sailer*, 321 F. Supp. 250 (ED Pa. 1970). The defendants appealed. Probable jurisdiction was noted. 400 U. S. 956.

II

The appellants argue initially that the States, consistent with the Equal Protection Clause, may favor United States citizens over aliens in the distribution of welfare benefits. It is said that this distinction involves no "invidious discrimination" such as was condemned in

King v. *Smith*, 392 U. S. 309 (1968), for the State is not discriminating with respect to race or nationality.

The Fourteenth Amendment provides, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It has long been settled, and it is not disputed here, that the term "person" in this context encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369 (1886); *Truax* v. *Raich*, 239 U. S. 33, 39 (1915); *Takahashi* v. *Fish & Game Commission*, 334 U. S., at 420. Nor is it disputed that the Arizona and Pennsylvania statutes in question create two classes of needy persons, indistinguishable except with respect to whether they are or are not citizens of this country. Otherwise qualified United States citizens living in Arizona are entitled to federally funded categorical assistance benefits without regard to length of national residency, but aliens must have lived in this country for 15 years in order to qualify for aid. United States citizens living in Pennsylvania, unable to meet the requirements for federally funded benefits, may be eligible for state supported general assistance, but resident aliens as a class are precluded from that assistance.

Under traditional equal protection principles, a State retains broad discretion to classify as long as its classification has a reasonable basis. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78 (1911); *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955); *Morey* v. *Doud*, 354 U. S. 457, 465 (1957); *McGowan* v. *Maryland*, 366 U. S. 420, 425–427 (1961). This is so in "the area of economics and social welfare." *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970). But the Court's decisions

have established that classifications based on alienage, like those based on nationality [5] or race,[6] are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a "discrete and insular" minority (see *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152–153 n. 4 (1938)) for whom such heightened judicial solicitude is appropriate. Accordingly, it was said in *Takahashi*, 334 U. S., at 420, that ". . . the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."

Arizona and Pennsylvania seek to justify their restrictions on the eligibility of aliens for public assistance solely on the basis of a State's "special public interest" in favoring its own citizens over aliens in the distribution of limited resources such as welfare benefits. It is true that this Court on occasion has upheld state statutes that treat citizens and noncitizens differently, the ground for distinction having been that such laws were necessary to protect special interests of the State or its citizens. Thus, in *Truax* v. *Raich*, 239 U. S. 33 (1915), the Court, in striking down an Arizona statute restricting the employment of aliens, emphasized that "[t]he discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States." 239 U. S., at 39–40. And in *Crane* v. *New York*, 239 U. S.

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[5] See *Oyama* v. *California*, 332 U. S. 633, 644–646 (1948); *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944); *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943).

[6] *McLaughlin* v. *Florida*, 379 U. S. 184, 191–192 (1964); *Loving* v. *Virginia*, 388 U. S. 1, 9 (1967); *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954).

195 (1915), the Court affirmed the judgment in *People* v. *Crane*, 214 N. Y. 154, 108 N. E. 427 (1915), upholding a New York statute prohibiting the employment of aliens on public works projects. The New York court's opinion contained Mr. Justice Cardozo's well-known observation:

> "To disqualify aliens is discrimination, indeed, but not arbitrary discrimination for the principle of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state. Ungenerous and unwise such discrimination may be. It is not for that reason unlawful. . . . The state in determining what use shall be made of its own moneys, may legitimately consult the welfare of its own citizens rather than that of aliens. Whatever is a privilege rather than a right, may be made dependent upon citizenship. In its war against poverty, the state is not required to dedicate its own resources to citizens and aliens alike." 214 N. Y., at 161, 164, 108 N. E., at 429, 430.

See *Heim* v. *McCall*, 239 U. S. 175 (1915); *Ohio ex rel. Clarke* v. *Deckebach*, 274 U. S. 392 (1927). On the same theory, the Court has upheld statutes that, in the absence of overriding treaties, limit the right of noncitizens to engage in exploitation of a State's natural resources,[7] restrict the devolution of real property to aliens,[8] or deny to aliens the right to acquire and own land.[9]

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[7] *McCready* v. *Virginia*, 94 U. S. 391 (1876); *Patsone* v. *Pennsylvania*, 232 U. S. 138 (1914).

[8] *Hauenstein* v. *Lynham*, 100 U. S. 483 (1879); *Blythe* v. *Hinckley*, 180 U. S. 333 (1901).

[9] *Terrace* v. *Thompson*, 263 U. S. 197 (1923); *Porterfield* v. *Webb*, 263 U. S. 225 (1923); *Webb* v. *O'Brien*, 263 U. S. 313 (1923); *Frick* v. *Webb*, 263 U. S. 326 (1923); but see *Oyama* v. *California*, 332 U. S. 633 (1948).

Takahashi v. *Fish & Game Commission*, 334 U. S. 410 (1948), however, cast doubt on the continuing validity of the special interest doctrine in all contexts. There the Court held that California's purported ownership of fish in the ocean off its shores was not such a special public interest as would justify prohibiting aliens from making a living by fishing in those waters while permitting all others to do so. It was said:

> "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this county shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws." 334 U. S., at 420.

Whatever may be the contemporary vitality of the special public interest doctrine in other contexts after *Takahashi*, we conclude that a State's desire to preserve limited welfare benefits for its own citizens is inadequate to justify Pennsylvania's making noncitizens ineligible for public assistance, and Arizona's restricting benefits to citizens and longtime resident aliens. First, the special public interest doctrine was heavily grounded on the notion that "[w]hatever is a privilege rather than a right, may be made dependent upon citizenship." *People* v. *Crane*, 214 N. Y., at 164, 108 N. E., at 430. But this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a "privilege." *Sherbert* v. *Verner*, 374 U. S. 398, 404 (1963); *Shapiro* v. *Thompson*, 394 U. S., at 627, n. 6; *Goldberg* v. *Kelly*, 397 U. S. 254, 262 (1970); *Bell* v. *Burson*, — U. S. —, — (1971). Second, as the Court recognized in *Shapiro*:

> "a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public

> assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. . . . The saving of welfare costs cannot justify an otherwise invidious classification." 394 U. S., at 633.

Since an alien as well as a citizen is a "person" for equal protection purposes, a concern for fiscal integrity is no more compelling a justification for the questioned classification in these cases than it was in *Shapiro*.

Appellants, however, would narrow the application of *Shapiro* to citizens by arguing that the right to travel, relied upon in that decision, extends only to citizens and not to aliens. While many of the Court's opinions do speak in terms of the right of "citizens" to travel,[10] the source of the constitutional right to travel has never been ascribed to any particular constitutional provision. See *Shapiro* v. *Thompson*, 394 U. S., at 630, n. 8; *United States* v. *Guest*, 383 U. S. 745, 757–758 (1966). The Court has never decided whether the right applies specifically to aliens, and it is unnecessary to reach that question here. It is enough to say that the classification involved in *Shapiro* was subjected to strict scrutiny under the compelling state interest test, not because it was based on any suspect criterion such as race, nationality, or alienage, but because it impinged upon the fundamental right of interstate movement. As was said there, "The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State

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[10] *E. g.*, *Passenger Cases*, 7 How. 283, 492 (1849); *Crandall* v. *Nevada*, 6 Wall. 35, 48–49 (1868); *Twining* v. *New Jersey*, 211 U. S. 78, 97 (1908); *Edwards* v. *California*, 314 U. S. 160, 178–181 (DOUGLAS, J., concurring), 183–185 (Jackson, J., concurring) (1941); *Shapiro* v. *Thompson*, 394 U. S., at 629; *Oregon* v. *Mitchell*, 400 U. S. 112, 285 (opinion of STEWART, J.) (1970).

to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." 394 U. S., at 634. The classifications involved in the instant cases, on the other hand, are inherently suspect and are therefore subject to strict judicial scrutiny whether or not a fundamental right is impaired. Appellants' attempted reliance on *Dandridge* v. *Williams*, 397 U. S. 471 (1970), is also misplaced, since the classification involved in that case (family size) neither impinged upon a fundamental constitutional right nor employed an inherently suspect criterion.

We agree with the three-judge court in the Pennsylvania case that the "justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class consists of aliens. Aliens like citizens pay taxes and may be called into the armed forces. Unlike the short-term residents in *Shapiro*, aliens may live within a state for many years, work in the state and contribute to the economic growth of the state." 321 F. Supp., at 253. See also *Purdy & Fitzpatrick* v. *California*, 71 Cal. 2d 566, 581–582, 456 P. 2d 645, 656 (1969). There can be no "special public interest" in tax revenues to which aliens have contributed on an equal basis with the residents of the State.

Accordingly, we hold that a state statute that denies welfare benefits to resident aliens and one that denies them to aliens who have not resided in the United States for a specified number of years violates the Equal Protection Clause.

III

An additional reason why the state statutes at issue in these cases do not withstand constitutional scrutiny emerges from the area of federal-state relations. The

National Government has "broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization." *Takahashi* v. *Fish & Game Commission*, 334 U. S., at 419; *Hines* v. *Davidowitz*, 312 U. S. 52, 66 (1941); see also *Chinese Exclusion Case*, 130 U. S. 581 (1889); *United States ex rel. Turner* v. *Williams*, 194 U. S. 279 (1904); *Fong Yue Ting* v. *United States*, 149 U. S. 698 (1893); *Harisiades* v. *Shaughnessy*, 342 U. S. 580 (1952). Pursuant to that power, Congress has provided, as part of a comprehensive plan for the regulation of immigration and naturalization, that "[a]liens who are paupers, professional beggars, or vagrants" or aliens who "are likely at any time to become public charges" shall be excluded from admission into the United States, 8 U. S. C. §§ 1182 (a)(8) and 1182 (a)(15), and that any alien lawfully admitted shall be deported who "has within five years after entry become a public charge from causes not affirmatively shown to have arisen after entry . . . ." 8 U. S. C. § 1251 (a)(8). Admission of aliens likely to become public charges may be conditioned upon the posting of a bond or cash deposit. 8 U. S. C. § 1183. But Congress has not seen fit to impose any burden or restriction on aliens who become indigent after their entry into the United States. Rather, it has broadly declared that "All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ." 42 U. S. C. § 1981. The protection of this statute has been held to extend to aliens as well as to citizens. *Takahashi*, 334 U. S., at 419 n. 7. Moreover, this Court has made it clear that, whatever may be the scope of the constitutional right of interstate travel, aliens

lawfully within this country have a right to enter and abide in any State in the Union "on an equality of legal privileges with all citizens under non-discriminatory laws." *Takahashi*, 334 U. S., at 420.

State laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to the Federal Government. In *Hines* v. *Davidowitz*, 312 U. S., at 66–67, where this Court struck down a Pennsylvania alien registration statute (enacted in 1939, as was the statute under challenge in No. 727) on grounds of federal pre-emption, it was observed that ". . . where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation . . . states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." And in *Takahashi* it was said that the States:

> "can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid." 334 U. S., at 419.

Congress has broadly declared as federal policy that lawfully admitted resident aliens who become public charges for causes arising after their entry are not subject to deportation, and that as long as they are here they are entitled to the full and equal benefit of all state laws for the security of persons and property. The state statutes at issue in the instant cases impose auxiliary burdens

upon the entrance or residence of aliens who suffer the distress, after entry, of economic dependency on public assistance. Alien residency requirements for welfare benefits necessarily operate, as did the residency requirements in *Shapiro*, to discourage entry into or continued residency in the State. Indeed, in No. 727 the parties stipulated that this was so.

In *Truax* the Court considered the "reasonableness" of a state restriction on the employment of aliens in terms of its effect on the right of a lawfully admitted alien to live where he chooses:

> "It must also be said that reasonable classification implies action consistent with the legitimate interests of the State, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. . . . The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality." 239 U. S., at 42.

The same is true here, for in the ordinary case an alien, becoming indigent and unable to work, will be unable to live where, because of discriminatory denial of public assistance, he cannot "secure the necessities of life, in-

cluding food, clothing and shelter." State alien residency requirements, that either deny welfare benefits to noncitizens or condition them on longtime residency, equate with the assertion of a right, inconsistent with federal policy, to deny entrance and abode. Since such laws encroach upon exclusive federal power, they are constitutionally impermissible.

IV

Arizona suggests, finally, that its 15-year durational residency requirement for aliens is actually authorized by federal law. Reliance is placed on § 1402 (b) of the Social Security Act of 1935, added by the Act of Aug. 28, 1950, c. 809, § 351, 64 Stat. 555, as amended, 42 U. S. C. § 1352 (b). That section provides:

> "The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes, as a condition of eligibility for aid to the permanently and totally disabled under the plan—
>
> . . . . .
>
> "(2) Any citizenship requirement which excludes any citizen of the United States." [11]

[11] Pursuant to his rulemaking power under the Social Security Act, 42 U. S. C. § 1302, the Secretary of Health, Education, and Welfare adopted the following regulations, upon which Arizona also relies:

"3720. *Requirements for State Plans*

"A State plan under titles I, X, XIV, and XVI may not impose, as a condition of eligibility, any citizenship requirement which excludes any citizen of the United States."

"3730. *Interpretation of Requirement*

"State plans need not contain a citizenship requirement. The purpose of IV–3720 is to ensure that where such a requirement is imposed, an otherwise eligible citizen of the United States, regardless of how (by birth or naturalization) or when citizenship was obtained,

The meaning of this provision is not entirely clear. On its face, the statute does not affirmatively authorize, much less command, the States to adopt durational residency requirements or other eligibility restrictions applicable to aliens; it merely directs the Secretary not to approve state-submitted plans which exclude citizens of the United States from eligibility. Cf. *Shapiro* v. *Thompson*, 394 U. S., at 638–641.

We have been unable to find in the legislative history of the 1950 amendments any clear indication of congressional intent in enacting § 1402 (b).[12] The provision appears to have its roots in identical language of the old age assistance and aid to the blind sections of the Social Security Act of 1935 as originally enacted. 49 Stat. 620, 42 U. S. C. § 302 (b); 49 Stat. 645, 42 U. S. C. § 1202 (b). The House and Senate Committee Reports expressly state, with reference to old age assistance, that:

> "A person shall not be denied assistance on the ground that he has not been a United States citizen for a number of years, if in fact, when he receives assistance, he is a United States citizen. This means that a State may, if it wishes, assist only those who are citizens, but must not insist on their having been born citizens or on their having been naturalized citizens for a specified period of time." [13]

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shall not be disqualified from receiving aid or assistance under titles I, X, XIV, and XVI.

"Where there is an eligibility requirement applicable to noncitizens, State plans may, as an alternative to excluding all noncitizens, provide for qualifying noncitizens, otherwise eligible, who have resided in the United States for a specific number of years." HEW Handbook of Public Assistance Administration, Part IV.

[12] H. R. Rep. No. 1300, 81st Cong., 1st Sess., 53, 153–154; S. Rep. No. 1669, 81st Cong., 1st Sess.; H. R. Rep. No. 2771, 81st Cong., 1st Sess., 118–119 (Conference Report).

[13] H. R. Rep. No. 615, 74th Cong., 1st Sess., 18; S. Rep. No. 628, 74th Cong., 1st Sess., 29.

It is apparent from this that Congress' principal concern in 1935 was to prevent the States from distinguishing between native-born American citizens and naturalized citizens in the distribution of welfare benefits. It may be assumed that Congress was motivated by a similar concern in 1950 when it enacted § 1402 (b). As for the indication in the 1935 Committee Reports that the States, in their discretion, could withhold benefits from noncitizens, certain members of Congress simply may have been expressing their understanding of the law only insofar as it had then developed, that is, before *Takahashi* was decided. But if § 1402 (b), as well as the identical provisions for old age assistance and aid to the blind, were to be read so as to authorize discriminatory treatment of aliens at the option of the States, *Takahashi* demonstrates that serious constitutional questions are presented. Although the Federal Government admittedly has broad constitutional power to determine what aliens shall be admitted to the United States, the period they may remain, and the terms and conditions of their naturalization, Congress does not have the power to authorize the individual States to violate the Equal Protection Clause. *Shapiro* v. *Thompson*, 394 U. S., at 641. Under Art. 1, § 8, cl. 4 of the Constitution, Congress' power is to "establish an uniform Rule of Naturalization." A congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity.[14] Since "statutes

[14] We have no occasion to decide whether Congress, in the exercise of the immigration and naturalization power, could itself enact a statute imposing on aliens a uniform nationwide residency requirement as a condition of federally funded welfare benefits.

should be construed whenever possible so as to uphold their constitutionality," *United States* v. *Vuitch*, — U. S. —, — (1971), we conclude that § 1402 (b) does not authorize the Arizona 15-year national residency requirement.

The judgments appealed from are affirmed.

It is so ordered.

MR. JUSTICE HARLAN joins in Parts III and IV of the Court's opinion, and in the judgment of the Court.